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Supreme Court, U.S.
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No. 07-84

IN THE

Supreme Court of the United States

Pamela L. Bickford,
Petitioner

v.

State of Alaska, Department of Education and Early Development, and Shirley J. Holloway, Commissioner of Education,
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The questions presented, are:

1. When a State education agency is presented with written notification of allegations claiming a long-standing, system-wide, problem with the evaluation of students for special education services demanding resolution for a class of children with disabilities, but requests disparate remedies - should a State education agency take additional steps to allow complainants an opportunity to provide additional information or clarification - before returning the complaint?

2. Under State complaint resolution procedures, 34 C.F.R. §§ 300.660-300.662, may a state agency return a complaint and require complainants to re-file the complaint, which resets the date notification is presented to the agency, or does the original date toll the presentment and statute of limitations?

3. Whether a State education agency has oversight of Section 504 claims that parallel claims brought under the IDEA?

4. Whether an individual aggrieved by the decision of a state agency complaint investigator has a right of appeal within the administrative procedures to satisfy exhaustion requirements?

5. Whether, under 20 U.S.C. § 1412(a)(11), a general requirement that a state education agency is obligated to ensure that federal statutory and regulatory requirements are met, may other state officials – in this case, an Assistant Attorney General of the Department of Law – intervene on behalf of the State education agency?

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[1] The Alaska Supreme Court's Opinion, at footnotes 8, 9, 10, 17, 28 and 29, makes numerous erroneous references to the "current version" of the State complaint resolution regulations citing 34 C.F.R. §§ 300.151-300.153. The correct citation is 34 C.F.R. §§ 300.660-300.662 (2006).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pamela L. Bickford, respectfully petitions for a writ of certiorari to review and vacate in full - (1) the dismissal order of the Supreme Court of the State of Alaska; (2) the Superior Court's affirmation of administrative dismissal; (3) the Commissioner of Education's dismissal, (4) the Complaint Investigator's Report; and (5) the administrative decision to separate the overlapping Section 504 and ADA claims from the IDEA claims in this case. Petitioner respectfully petitions this Court to provide additional instructions to remand this case to the primary jurisdiction of the Alaska Department of Education and Early Development to allow complainants to amend their original complaint and proceed under State complaint resolution procedures on all claims.

Further, petitioner respectfully petitions this Court to provide additional instruction with regards to the standard of review applicable to cases brought under the Individuals with Disabilities Act in state court actions when directed to appeal to state court, not federal court, by a State education agency.

OPINIONS BELOW

The order of the Supreme Court for the State of Alaska (App. B, *infra*, 2-20) is reported at 115 P.3d 302 (Alaska 2007). The Superior Court's order (App. D, *infra*, 22-31) is unreported. The Department of Education's Complaint Investigation Report (App. F, *infra*, 33-44) is unreported.

STATEMENT OF JURISDICTION

The Complaint Investigation Report, App. F, *infra*, 33a-44a, was filed on August 5, 1999 found no violation of law yet recommended the original complaint be re-submitted. The decision to dismiss the complaint by the Commissioner of the Department of Education, App. E, *infra*, 32a, was entered on August 20, 1999 with notification of right to appeal

to the State Superior Court according to Rule 602(b) of the Alaska Rules of Appellate Procedure. The Superior Court entered judgment for respondent on October 4, 2004. App. D, *infra*, 22a-31a. The Superior Court denied appellant's motion to alter or amend judgment, App. C, *infra*, 21a. The Supreme Court for the State of Alaska entered judgment for respondent on February 9, 2007. App. B, *infra*, 2a-20a. The Supreme Court for the State of Alaska denied rehearing on April 11, 2007. App. A, *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 1221e-3. General authority of the Secretary of Education, under the functions of the U.S. Department of Education, 20 U.S.C. § 1221 *et seq.*, provides:

> The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.

Section 1412(a) – State eligibility, of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides:

> A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:
>
> > (1)(A) A Free appropriate public education is available to all children with disabilities residing in the State . . .

Section 1412(a) – State eligibility, of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, specific to evaluation provides:

> (7) Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

Section 1412(a) State eligibility, of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides:

> (11)(A) The State educational agency is responsible for ensuring that –
> (i) the requirements of this subchapter are met; and
> (ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency -
> (I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and (II) meet the educational standards of the State educational agency.

Section 1414(b)(3)(B) of the IDEA, referenced above in section 1412(a)(7) provides:

> [A]ny standardized tests that are given to the child –
> (i) have been validated for the specific purpose for which they are used;
> (ii) are administered by trained knowledgeable personnel; and
> (iii) <u>are administered in accordance with any instructions provided by the producer of such tests</u> (emphasis added).

Section 1415(*l*) Rule of Construction, of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 *et seq.*], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 *et seq.*], or any other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

29 U.S.C. § 794, herein referenced as Section 504, provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ... The head of each agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. ... [T]he term "program or activity" means all of the operations of – (1)(A) a department, agency, ... of a State ... or (B) the entity of such State or local government that distributes such assistance and each such department or agency ... to which the assistance is extended, in the case of assistance to a State or local government...

STATEMENT

Eight parents with the compiled evaluations of their thirteen children attempted to correct a long-standing systemic evaluation practice they alleged to be contrary to the IDEA, Section 504, and the ADA as these Acts of Congress provide overlapping evaluation protections, in that "any standardized tests that are given to [a] child . . . are administered in accordance with any instructions provided by the producer of such tests." 20 U.S.C. § 1414(b)(3)(B); "in conformance with the instructions provided by their producer," 34 C.F.R. § 104.35(b)(1); and all three Acts of Congress provide the opportunity for individuals to raise complaints with the supervising agency. Parent, Pamela Bickford, contacted the publisher of the test to confirm that the allegedly erroneous practice was "not in conformance with the instructions provided" by the test producer. EOR 1-6. Parents attempted to bring their concerns to the attention of both the local school district and the State Department of Education, and became frustrated when neither agency would address their concerns. EOR 7-11. Robyn Rehmann, of the Anchorage School District, asked the Department to undertake a general review of testing procedures, appending to her request, a photocopy of the section of the Anchorage Special Education Handbook relating to evaluation procedures, an exact match to the State Handbook. EOR 12. Parents, suspecting that relying on the Anchorage School District's request would result in an unreviewable dead-end, set out to challenge the offending evaluation "practice" against both agencies parents contacted previously with their information and concerns.

A. Statutory and Regulatory Framework

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, contains an "anti-discrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against indi-

viduals with disabilities. *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 286, 277 (1987). Congress found that - "[I]ndividuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communications, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. § 701(a)(2) & (a)(5) (emphasis added).

Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, "any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals. *Arline*, 480 U.S. at 287.

Section 504 may be enforced through private suits against programs or activities receiving federal funds. *King v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980). Congress conditioned the receipt of federal financial assistance on the state agencies' waiver of Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7. This Court held that remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. *Green v. Mansour*, 474 U.S. 64, 68 (1985). Further, this Court held established rules provide ample means to correct ongoing violations of law and vindicate interests which animate the Supremacy Clause. *Alden v. Maine*, 527 U.S. 706, 757(1999).

The Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, was enacted, in part, "to assure that all children with disabilities have available to them ... a free

appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c). Consistent with this purpose, the IDEA authorizes federal financial assistance to States that agree to provide disabled children with special education and "related services." 20 U.S.C. § 1400(d), 1412(a)(1). *See, Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999). The IDEA "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Honig v. Doe*, 484 U.S. 305, 310 (1988) (citation and footnote omitted); *see also Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982) (holding that the EHA established right to public education for students with disabilities that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction").

Among the most important of the IDEA's goals is the protection of "parents' right to be involved in the development of their child's educational plan." *Amanda v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). Toward this end, participating states are required to establish procedures giving parents "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). After making their complaint, parents are entitled to "an impartial due process hearing." *Id.* 1415(f). A decision of the due process hearing "shall be final," *Id.* 1415(i)(1)(A), except that "[a]ny party aggrieved by the findings and decision ... shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the

United States." *Id.* 1415(i)(2)(A). These procedures, including the available appeal, must be explained to parents in writing upon the filing of an administrative complaint. *Id.* 1415(d).

Before bringing a suit based on a violation under the IDEA, a complainant must normally exhaust the due process hearing procedures required by 20 U.S.C. § 1415. The exhaustion requirement also applies to suits under "other Federal laws protecting the rights of children with disabilities . . . seeking relief that is also available under" IDEA. 20 U.S.C. § 1415(*l*). The application of the IDEA's statutory exhaustion requirement is predominantly a question of law that is reviewed *de novo*. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992).

Distinct from the IDEA's due process requirements, the U.S. Department of Education promulgated regulations pursuant to its general rulemaking authority requiring each recipient of federal funds, including funds provided through the IDEA, to put in place a complaint resolution procedure (CRP). *See*, App., *infra*, 47a-54a. 34 C.F.R. §§ 300.660-300.662 (citing 20 U.S.C. § 1221e-3 as authority for rules); *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1029 (9th Cir. 2000) (adding "The regulations originated as part of the Education Department General Administrative Regulations ("EDGAR")). App., *infra*, 47a-54a.

The CRP "is a creature of the [Department's] own regulations, [its] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). According to the U.S. Department of Education, the CRP is intended to "*allow* [parents and school districts] to resolve differences without resort to more costly and litigious resolution through due process." *Assistance to States for the Education of Children With Disabilities*, 64

Fed.Reg. 12,406, 12,646 (March 12, 1999) (emphasis added); *see also* Office of Special Education Programs Memorandum 94-16 (March 22, 1994) (OSEP Memorandum 94-16 at App., *infra*, 47a-54a.) (describing that CRP regulations "are under the direct control of the SEA [State education agency]" App., *infra*, 51a, " have the potential for providing a less costly and more efficient mechanism for resolving disputes than is possible under the impartial due process hearing system" *Id.*, and "[f]or these reasons, effective implementation of the complaint management procedures will have a positive impact on both parents and public agencies"). *Id.*

On a case by case basis, a reviewing court may choose to require or to accept exhaustion of the CRP "as a *substitute* for exhausting IDEA procedures in challenges to facially invalid policies," *Hoeft*, 967 F.2d at 1308, as exhaustion is required even though due process hearing officers are not authorized to adjudicate questions of statutory compliance because "administrative exhaustion may be necessary to give the state a reasonable opportunity to investigate and correct such policies." *Id.* at 1307. However this Court has held, where the challenge is to a facially invalid policy, and the state refuses to alter the policy after a CRP complaint, then further exhaustion may be excused because "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).

B. Factual and Procedural Background

The parent's original complaint of October 1998 alleging violations of the IDEA, Section 504, and other grounds that potentially would impact a large class of individuals, was prepared from the forms books found at the local law library, without assistance of counsel. At the time parents submitted the complaint, Alaska provided a two-tier system for administrative due process hearings. 4 AAC 52.550 (1983). Parents erroneously assumed a complaint and request for a due proc-

ess hearing naming the State educational agency responsible for monitoring and compliance would justify a second-tier hearing, therefore they titled the document "Complaint and Request for a Due Process Hearing." App., *infra*, 5a. This was later found to be a request for disparate remedies, App., *infra*, 16a, and not correctable without re-filing.

Without inquiry or correspondence from state officials of the Department of Education, on November 17, 1998, the original complaint was returned by Assistant Attorney General Thomas Dahl. App., *infra*, 6a. The parents responded to Mr. Dahl's letter requesting clarification adding that it was their "intention to file this complaint in District Court in Anchorage as we believe the evaluation procedures employed by the Anchorage School District, and by other districts within the State of Alaska, deny learning disabled students their right to a free appropriate public education." App., *infra*, 7a. This correspondence was from Dahl (on Department of Law Letterhead) and, parents responded directly to Dahl. EOR 38-40, and 47-49. When there was no response from the Department of Law, in order to preserve their date of discovery, the case was filed, but District Court Judge Russel Holland dismissed the case without prejudice, citing *Collinsgru v. Palmyra Bd. Of Educ.*, 161 F.3d 225 (3rd Cir. 1998), as plaintiffs were not represented by counsel and non-attorney *pro se* parents were not allowed to represent the interests of their children in federal court.[2] App., *infra*, 9a, footnote 18.

When the revised State complaint resolution procedures, 34 C.F.R. §§ 300.660-300.662, were issued, parents realized the state agency had the authority under the complaint procedures to order compensatory services as a remedy.[3] On May

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[2] *See*, recent reversal of Collinsgru, *Winkelman v. Parma City School District*, 127 S Ct 1994 (May 21, 2007)

[3] *See*, Adoption of State Complaint Procedures (§300.660), Fed Reg., Vol. 64, No. 48 (March 12, 1999), page 12646 (Also provided to the Complaint Investigator, see App., *infra*, 35a [her report cites the page number as 12464], which states

16 and May 24, parents then filed with the State education agency, a second and third complaint; separating Section 504 and ADA claims from the IDEA claims. App., *infra*, 9a, 34a, and 35a. To safeguard their original date of discovery, the original 1998 complaint was appended to both complaints. App., *infra*, 9a, 34a, 35a, and 39a.

Penny Beiler, Human Resource Manager for the Department of Education, responded to the Section 504 complaint by stating:

> "The Department of Education has no responsibility for oversight of Section 504 and ADA compliance at the local school district level. Your complaint should be directed to the Office of Civil Rights." App., *infra*, 45a.

Likewise, Wendy Tada, the Manager for Special Education Programs, responding to the third complaint stated that the "Department has no responsibility for oversight of complaints alleging violations of Section 504 or the ADA at the local district level." EOR 68.[4] On June 16, following a teleconference, Ms. Tada summarized the participants agreement "that the issue to be the subject of the complaint investigation" to be

> "Did the Department of Education follow the complaint procedures as required by the IDEA?" App., *infra*, 10a.

> "The note merely reflected what has always been the case – that SEAs have the authority to order compensatory services in appropriate circumstances as a remedy for violations of Part B in resolving complaints under the procedures in §§ 300.660-300.662." Further on the same page, "[a] State's general supervisory responsibility is not satisfied by relying on private enforcement efforts through due process actions for all issues that could be the subject of a due process hearing. In addition, the State complaint process and mediation provide parents and school districts with mechanisms that allow them to resolve differences without resort to more costly and litigious resolution through due process."

[4] Alaska Supreme Court Excerpt of Record ("EOR").

The Complaint Investigation Report was issued on August 5, 1999, ending with the comment - "this investigator would encourage the complainant to re-submit the complaint to the appropriate department, being sure to follow the instructions provided in the Notice of Procedural Safeguards: Parental Rights for Special Education booklet." App., *infra*, 44a. On August 20, 1999, in response to Bickford's inquiry, the Commissioner of Education, dismissed the complaint and directed aggrieved complainants to appeal the decision within 30 days to the Superior Court. App., *infra*, 32a.

Further research into the distinction between what issues are appropriate for an administrative complaint versus a due process hearing, resulted in receiving a copy of *Memorandum 94-16* from the U.S. Department of Education. App., *infra*, 47a. Memorandum 94-16 clearly states that the State complaint management procedures are available for resolving "any complaint that meets the requirements of §300.662, including (1) complaints that raise systemic issues, and (2) individual child complaints that are filed by parents" (emphasis in original). App., *infra*, 50a. On October 13, 2000, Bickford moved for remand, pursuant to AS 44.62.570(e) due to agency's notification error, or alternatively, to allow exhaustion by an AS 44.62.570(d) de novo hearing. EOR 106-114. Superior Court Judge Wolverton ordered the case remanded to the Department of Education "to conduct an evidentiary hearing to receive testimonial *and documentary evidence* that Appellant seeks to include in the record, with transcripts to be added to the record on appeal and allowance for additional briefing." EOR 120, App., *infra*, 11a. Jonathan Katcher, Hearing Officer for the Department of Education, in preliminary proceedings stated:

> "This court doesn't have jurisdiction for compensatory education for a whole bunch of other children. And, you are not a lawyer and cannot advocate on behalf of other children," EOR 159, and, further

> "If an investigation were to discern some sort of practice that needed to be corrected with future conduct and a requirement laid down by the state educational agency requiring the local school district to behave differently in the future then yes, that's within the proper scope of a complaint investigation." EOR 160.

The evidentiary hearing was held December 3-4, 2003. EOR 171. A transcript was not prepared as all of appellant's proposed documents were excluded and witnesses that were allowed to testify were limited by attorney-client and work-product doctrines by both participating Assistant Attorney Generals. App., *infra*, 12a.

On January 3, 2004, Bickford filed a motion for summary judgment requesting the original document, attached - corrected and amended, be remanded to the agency for resolution. App., *infra*, 12a. The last attachment was the Consent Decree and Notice of Settlement in a similar case, *Dunajski v. Keegan*, No. CIV 99-0353 PCT RCB (D.C. Arizona 2001), which provided guidelines and sample notification letters for all stages of a State complaint resolution procedure. EOR 200. Assistant Attorney General Slotnick, photocopied the "corrected complaint" from the court documents and delivered it to Art Arnold, Special Education Director for the Department of Education, who requested clarification to initiate complaint proceedings with a "three-year look-back period." EOR 222 Bickford spoke with AAG Slotnick by telephone regarding Art Arnold's request, and he agreed to convey appellant's hesitation to act outside the jurisdiction of the Superior Court. EOR 221.

The Superior Court order dismissing the complaint was entered on October 4, 2004. App., *infra*, 22a-31a. On October 14, 2004, Bickford filed a timely motion to alter or amend the dismissal. The Superior Court denied Bickford's motion to amend on November 11, 2004. App., *infra*, 21a. Bickford filed a timely notice of appeal on November 15, 2004 to the Supreme Court of Alaska. The Supreme Court filed the Order affirming the Superior Court's and the De-

partment's dismissal of the complaint on February 9, 2007. App., *infra*, 2a-20a. Bickford filed a petition for rehearing on February 20, 2007, which was denied by the Supreme Court on April 11, 2007. App., *infra*, 1a.

REASONS FOR GRANTING THE WRIT

1. A State educational agency, responsible for general supervision under IDEA, should take additional steps to allow clarification before a complaint is returned.

Petitioner respectfully submits that the history of this case show the agency's action or inaction, as the case may be, conflict with its obligation to maintain supervision and compliance with federal and state law. When the Department received the third complaint requesting "disparate remedies," it responded to the written complaint and gave parents the opportunity to amend missing documents, App. *infra*, 35a, as petitioner contends should have been the response to the parent's first complaint.

Because, the original systemic claims of erroneous evaluations and discrimination have never been addressed or resolved, and neither the Alaska Department of Education, nor the Alaska Court System, have moved to "independently" protect the interests of the class of children with disabilities, this petition for writ of certiorari follows, as only this Court can intervene in this matter.

2. A State Complaint Management System is the proper jurisdiction within which to raise systemic issues protected by both Section 504 and the IDEA.

The Alaska State Supreme Court affirmed the dismissal of this case, in part "because the original complaint raised issues beyond the department's jurisdiction," App., *infra*, 2a; and "that Bickford's new complaint seemed to include allegations of ADA and section 504 violations, which the de-

partment had no authority to address." App., *infra*, 9a. In general, both Section 504 of the Rehabilitation Act, and the IDEA, hold a State education agency - the recipient of Federal financial assistance, responsible for all educational programs within the state. 29 U.S.C. § 794, and 20 U.S.C. § 1412(a)(11). All three Acts of Congress provide complaint procedures are to be in place. 28 C.F.R. § 35.170; 34 C.F.R. § 104.6(b); and 34 C.F.R. §§ 300.660-300.662.

Section 504 prohibits qualified individuals from being denied the benefits of a service, program, or activity, or being subjected to discrimination by any such entity. *Id.* § 794. A system-wide method of conducting evaluations of children with disabilities that fails to diagnose their specific educational needs, because the test is not administered in conformance with the instructions provided by the test producer, facially violates 34 C.F.R. § 104.35(b)(1), and will unfairly deny some children with disabilities services they would otherwise qualify for, thereby subjecting them to discrimination.

The IDEA requires the State education agency, not the local school district, "shall ensure that each public agency establishes and implements procedures that meet the requirements of §§ 300.531-300.536," 34 C.F.R. § 300.530; 20 U.S.C. § 1414(b)(3); and 1412(a)(7). In addition, the underlying evaluation complaint - that evaluations were not administered "in accordance with any instructions provided by the producer of the tests," 34 C.F.R. § 300.532(c)(1)(ii) violates rights of children with disabilities to an appropriate education because their educational program will not be tailored to their individual needs, as they were incorrectly diagnosed.

Assistant Attorney General Dahl, Penny Beiler, Wendy Tada, Complaint Investigator Barats, the Superior Court, and finally the State Supreme Court; were collectively in error. The State Complaint Management System was the only administrative forum tailored to address "any" systemic issue. App., *infra*, 50a.

The Anchorage School District's offer and subsequent insistence to set a due process hearing, and Petitioner's refusal and attempts to correct the error, have been criticized at every review. The Due Process Hearing System on the other hand, is better suited to discrete, technical disputes regarding a single child. In this case, the school district asserted an IDEA due process hearing would be necessary for each and every child. EOR 35. Petitioner respectfully submits the State education agency had a duty to remedy the harm done to all of the children with disabilities wrongfully evaluated under its supervision and requiring parents to re-file, limiting issues to the IDEA and their specific children was contrary to the law.

Only this Court can bring the required uniformity regarding the exhaustion requirements under the IDEA, Section 504, and the ADA when the three Acts of Congress overlap.

3. Requiring complainants to re-file a complaint is contrary to CRP procedures as it resets the date the issue was brought to the attention of a supervising agency.

The State complaint management regulations, 34 C.F.R. §§ 300.660-300.662, contain a timeline within which the procedure is to be completed and allows for exceptional circumstances. The CRP does not provide for re-filing. Petitioner can find no case law to support this interpretation. In the interests of protecting the interpretation of the CRP regulations, all decisions finding that re-filing was an appropriate avenue that was erroneously not taken - must be vacated, and the matter returned to the agency for complaint resolution.

4. The Attorney General had no authority to intervene on behalf of State education agency officials.

The Commissioner of Education, as the principal executive officer, AS 14.07.145, may assign functions vested in the department to subordinate officers and employees, AS 44.17.010, under the supervision, direction, and control of the

principal executive officer, AS 44.17.040. The IDEA places primary responsibility on State education agencies as they alone are "responsible for ensuring the grant requirements are met," 20 U.S.C. § 1412(a)(11), ensuring local education agencies comply with those requirements, *Id.* § 1412(a)(12). Congress intended State education agencies "assure a single line of responsibility with regard to the education" of children with disabilities, *Senate Report No. 94-168* (1975).

The Assistant Attorney Generals assigned to the Department is not under the supervision, direction, or control of the Commissioner of Education. In the State of Alaska, the Attorney General provides guidance and represents state agencies in legal matters, but serves the Governor. The Alaska Supreme Court makes light of Bickford's argument that any action by the Assistant Attorney General (returning the complaint) was beyond the "primary jurisdiction" of the State education agency, App. *infra*, 14a, and therefore impermissible under the IDEA.

In the majority of states, the Attorney General is elected to office and serves to guard the public's interest. An Attorney General under those circumstances would never allow a State education agency to disregard its lawful obligations and might instead advise or take action to guard the public interest. In this case, Assistant Attorney General Dahl intervention diverted already confused parents from the procedural track that would resolve their concerns.

In interpreting a statute, the U.S. Supreme Court has emphasized the importance of avoiding "absurd results"[5] or

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[5] The California State Appellate Court in *County of Los Angeles v. Smith*, 88 Cal.Rptr.2d 159, 163 (Cal App 2 Dist 1999) cites the United States Supreme Court in *United States v. Turkette*, 452 U.S. 576, 580 (1981)

> "Authoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), *Commissioner v.*

"unreasonable results whenever possible."[6] The focus of the complaint investigation was directed to actions of the Assistant Attorney General who returned the October 1998 complaint to Bickford, diverting the attention from the absence of action by state education agency officials responsible for, and ultimately obligated to, ensure that all children with disabilities have available to them " a free appropriate public education" designed to meet their individual needs.[7] The statute provides federal funds to states to accomplish this goal, but "conditions such funding on compliance with certain goals and procedures."[8] As the recipient of federal financial assistance, the Department must be held responsible for supervision of itself and local education agencies receiving federal funds from the state education agency. The State complaint resolution procedures are a principle avenue for notification of potential violations of law under the primary jurisdiction of the Department and provides that the Department is to remedy denial of appropriate services[9] without requiring resort to an impartial hearing[10] and without requiring "repre-

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Brown, 380 U.S. 563, 571 (1965). We nevertheless begin with the language of the statute.

[6] *County of Los Angeles*, citing *American Tobacco Co. v. Patterson*, 456 U S 63, 71 (1982):

> "Statutes should be interpreted to avoid untenable distinctions and unreason-able results whenever possible."

[7] *County of San Diego v. Cal. Special Educ. Hearing*, 93 F.3d 1458, 1461 (9th Cir. 1996).

[8] *Ojai Unified School Dist. v. Jackson*, 4 F 3d 1467, 1469 (9th Cir. 1993)

[9] 34 CFR § 300.660(b) (1999), the U S. Department of Education in discussing changes in the regulations as a result of the recent elimination of the notes states:

> "The note merely reflected what has always been the case – that SEAs have the authority to order compensatory services in appropriate circumstances as a remedy for violations of Part B in resolving complaints under the procedures in §§ 300.660-300.662."

Federal Register, Vol. 64, No. 48, 12646

[10] Exc. 272, OSEP Memorandum 94-16 (March 22, 1994)

sentation" by counsel to ensure the interests of all similarly affected children are protected.

Remand to the administrative agency returns the case to the primary jurisdiction of the supervising agency, avoids setting an absurd or unreasonable precedent as to procedure and policy, and forces the Department to remedy their shortcomings with regards to all children with disabilities affected by the alleged violation of law and their parents who unknowingly failed to initiate an administrative complaint or administrative hearing to correct the erroneous evaluation "practice" with regards to their child's education, a common-law remedy for educational harm.

5. A complainant, under the State Complaint Resolution Procedures, aggrieved by a state complaint investigation report has a right of appeal within administrative procedures to satisfy exhaustion requirements.

Only this Court can determine whether the regulations providing for Alaska State complaint resolution procedure fail to provide sufficient due process at the administrative level. To do this it must clarify a complainant's right to appeal for an impartial administrative review of adverse determinations made by State complaint investigators. Generally, an appellant is required to exhaust available administrative remedies to provide a reviewing court a case ripe for review. *See*, 20 U.S.C. § 1415(*l*). This Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), found "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.*, at 481. And, State complaint procedures are not sufficient to exhaust administrative remedies, *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (CA2 1998).

The doctrine of exhaustion under IDEA serves several purposes: permitting the exercise of agency discretion and expertise on issues requiring those characteristics; allowing full development of technical issues and a factual record prior to court review; preventing deliberate disregard and circum-

vention of agency procedures established by Congress, and, avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any errors. See, *McKart v. United States,* 395 U.S. 185, 193-95 (1969). This exhaustion requirement applies not only to IDEA claims, but also to any other federal claims seeking relief that would be available under the IDEA, *Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1302-03 (9th Cir. 1992), (finding that failure to exhaust administrative procedures deprives the court of subject-matter jurisdiction).

As these published decisions are reviewed by the general public and may be cited and interpreted in a manner that may confound the purposes of law; and because the decision below is erroneous in that it makes no reference to this Court's IDEA review standard in *Rowley*, whether "the State complied with the procedures set forth in the Act" and, whether the substantive requirements were met, *Id,* 458 U.S. 176, 206-07 (1982), deferring instead to appellate procedures under State law, requiring only that a reviewing court apply its independent judgment; without regard to *Rowley*, petitioner prays certiorari be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 2007

Supreme Court, U.S.
FILED
JUL 09 2007
OFFICE OF THE CLERK

No. 07-84

IN THE

Supreme Court of the United States

Pamela L. Bickford,
Petitioner

v.

State of Alaska, Department of Education and Early Development, and Shirley J. Holloway, Commissioner of Education,
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Alaska

Petitioner's Appendix to PETITION FOR WRIT OF CERTIORARI

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[1] The Alaska Supreme Court's Opinion, at footnotes 8, 9, 10, 17, 28 and 29, makes numerous erroneous references to the "current version" of the State complaint resolution regulations citing 34 C.F.R. §§ 300.151-300.153. The correct citation is 34 C.F.R. §§ 300.660-300.662 (2006).

In the Supreme Court of the State of Alaska

Pamela L. Bickford	) Supreme Court No.
Appellant	) S-11731
State of Alaska, Department of	) **Order**
Education and Early Development,	) Petition for Rehearing
and Shirley J. Holloway,	)
Commissioner of Education,	) Date of Order: 4/11/07
Appellees.	)
Trial Court Case # 3AN-99-03470CI	

Before: Matthews, Easthaugh, Bryner, and Carpeneti, Justices. [Fabe, Chef Justice, not participating.]

On consideration of the petition for rehearing filed on 2/20/07, and the State's response filed on 3/8/07,
It is Ordered:

1. The petition for rehearing is **Denied** and footnote 16 has been amended to read as follows:
   "In addition, the district evidently thought that Bickford might have meant to pursue an administrative complaint under the IDEA. In September 1998, based on a letter and other materials sent by Bickford in August 1998, the district had asked the Department of Education to undertake a general review of its testing procedures for compliance with state and federal law. It appears that the department undertook such a review."
2. The corrected opinion has been sent to the West Publishing and LexisNexis and will be posted on the Court System's website.

Entered by the direction of the court.

Clerk of the Appellate Courts
/s/Marilyn May

cc Supreme Court Justices
Judge Suddock
Trial Court Appeals Clerk/Anchorage
Publishers (Opinion 6097, 2/9/07)

Distribution: Stephen C. Slotnick, Assistant Attorney General, PO Box 110300, Juneau, AK 99811, Pamela Bickford, 16840 Tide View Drive, Anchorage, AK 99516

THE SUPREME COURT FOR THE STATE OF ALASKA

PAMELA BICKFORD, Appellant	)	Supreme Court No. S-11731
v.	)	Superior Court No.
STATE OF ALASKA, DEPARTMENT OF EDUCATION AND EARLY DEVELOPMENT, and SHIRLEY J. HOLLOWAY, COMMISSIONER OF EDUCATION, Appellees.	)	3AN-99-3470CI
	)	**OPINION**
	)	No. 6097 – February 9, 2007

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Suddock, Judge.

Appearances: Pamela L. Bickford, pro se, Anchorage. Stephen C. Slotnick, Assistant Attorney General, and David W. Marquez, Attorney General, Juneau, for Appellees.

Before: Bryner, Chief Justice, Matthews, Eastaugh, and Carpeneti, Justices. [Fabe, Justice, not participating.]

I. INTRODUCTION

Pamela Bickford submitted an administrative complaint to the Alaska Department of Education and Early Development, alleging that the department had violated the Individuals with Disabilities Act (IDEA) by declining to decide an earlier complaint of hers unless she resubmitted a clarified version. After investigating the new complaint, the department ruled that Bickford's original complaint had been properly rejected. The main issue Bickford now appeals is whether the department violated the IDEA by rejecting her original complaint instead of deciding its merits. Because the first complaint raised issues beyond the department's jurisdiction and failed to specify whether Bickford meant to file it as a civil action, a request for an IDEA due process hearing, or an IDEA administrative complaint, we hold that the department properly returned it to Bickford for clarification.

II. FACTS AND PROCEEDINGS

A. Summary of Statutory and Regulatory Framework

Before we describe the events that led to this appeal, it will help to summarize the legal framework in which those events occurred. This case centers on the department's compliance with the IDEA, a federal law dealing with special education of children.[1] The IDEA requires any state receiving federal funds for special education to adopt and enforce laws and regulations complying with the IDEA's requirements.[2] Alaska receives IDEA funding and must therefore comply with its requirements. The IDEA also creates various procedures designed to allow parents and other interested parties ways to ensure state compliance with the Act's requirements. Two of those procedures are particularly relevant here: complaints for due process hearings and administrative complaints.

1. Complaints for due process hearings

The IDEA provides that any parent who believes that a school has misidentified, misevaluated, improperly placed, or otherwise denied a free and appropriate public education to a qualifying child has a right to file a complaint for an "impartial due process hearing."[3] These hearings are designed to focus on disputes concerning discrete decisions involving

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1 *See generally* 20 U.S.C. §§ 1400-1482 (2005) (establishing funding structure for state special education programs and providing for private enforcement through various administrative procedures such as cause of action in participating through "due process hearings" and administrative complaints). Alaska provides for IDEA "due process hearings" in AS 14.30.193 and 4 AAC 52.550.

2 20 U.S.C. § 1411(a)(1).

3 20 U.S.C. § 1415(f)(1)(A) provides:

> Whenever a complaint has been received under subsection (b)(6) [involving any matter relating to the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education to a child or the provision of a free appropriate pubic education to a child] or (k) [involving placement in an alternative setting] of this section, the parents or the local education agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency

specific children and the children's parents; they are formal adjudicatory proceedings in which parents and children have the rights to counsel, to present evidence, and to call, confront, and compel the attendance of witnesses.[4] Due process hearings are also required to be expedited: once a parent asks for a hearing, a hearing officer has only forty-five days in which to issue a final, written decision.[5] The IDEA gives states the option of specifying whether due process hearings are the responsibility of local school systems or the state system.[6] Alaska has chosen to require complaints for due process hearings to be made to the local district from which the complaint arises.[7]

2. Complaints for administrative investigations

The IDEA separately entitles any interested persons or groups to initiate investigations of compliance with the IDEA by submitting an informal complaint to the state educational agency – in Alaska, the Department of Education.[8] When it receives a complaint for an administrative hearing, the department must carry out an independent on-site investigation, give the complainant an opportunity to supply additional information about the allegations contained in the complaint,

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4 *Id.* § 1415(h).

5 20 U.S.C. § 1415(f)(1)(B)(ii) (if local education agency has not remedies parents' complaint within 30 days parent may request due process hearing); 34 C.F.R. § 300.510(b)(1)-(2) (if agency has not resolved parent complaint within 30 days of receiving complaint a due process hearing may occur and the time line for issuing a final decision begins), 34 C.F.R. § 300.515(a)(1)-(2) (agency must submit written decision to parties within 45 days of end of 30-day period).

6 20 U.S.C. § 1415(f)(1)(A).

7 AS 14.30.193(a) provides that "[a] school district or a parent of a child with a disability may request a due process hearing" and that [a] request is made by providing written notice to the other party to the hearing." (Emphasis added.)

8 34 C.F.R. §§ 300.660-662 (1998) (current version at 34 C.F.R. §§ 300.151-153 (2006)). Unlike the due process hearing, which is expressly provided for by statute, the administrative complaint is established only in the code of federal regulations. *See Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1026 (9th Cir. 2000). Alaska provides for complaints requesting administrative hearings in 4 AAC 52.500.

determine whether a violation of the IDEA has occurred and, within sixty days of accepting the complaint, issue a written decision supported by factual findings and conclusions of law, as well as an explanation of its reasons.[9] The department's final decision must also "include . . .[p]rocedures for effective implementation of the [agency's] final decision," including, if needed, "technical assistance activities, negotiations, and corrective actions to achieve compliance."[10]

B. Bickford's First Complaint

Pamela Bickford is the mother of a student once identified by the Anchorage School District as learning disabled. In the fall of 1998, she came to believe that the school district was misusing testing procedures for evaluating special learning disabilities. On October 9, 1998, Bickford mailed a document entitled "Complaint and Request for Due Process Hearing" to the board and commissioner of education, and to the board and superintendent of the Anchorage School District. The complaint's caption listed eight individuals as plaintiffs, including Bickford, and asserted that the plaintiffs were acting "on their own behalf and on behalf of a class of similarly situated persons." The caption named as defendants the Anchorage School Board and School District Superintendent as well as the Alaska State Board of Education and the Alaska Commissioner of Education. Bickford was the only plaintiff who had actually signed the complaint.

Bickford's complaint set out twenty separate counts accusing the Anchorage School District of violating IDEA student-evaluation procedures,[11] and of more broadly violating section 504 of the Rehabilitation Act,[12] the Americans with Disabilities Act,[13] section 1983 of the Civil Rights Act,[14] and

---

9 *See* 34 C.F.R. § 300.661(a)(4) (1998) (current version at 34 C.F.R. § 300.152(a)(5) (2006)

10 34 C.F.R. § 300.661(a) (1998) (current version at 34 C.F.R. § 300.152(b)(2)(i)-(iii) (2006)).

11 20 U.S.C. §§ 1412, 1414.

12 29 U.S.C. § 794 (2005)

13 42 U.S.C. §§ 12101-12213 (2005).

14 42 U.S.C. § 1983 (2005)

the Fourteenth Amendment to the United States Constitution. The complaint sought various forms of relief for these violations, including injunctive relief, costs and fees, and "[s]uch other or additional relief as this Court may deem just and proper." Although the format of the complaint, the violations it alleged, the relief it requested, and the formal certificate of service that accompanied it all seemed to suggest that it might have been drafted for filing as a civil court action, the complaint failed to specify where it was actually meant to be filed.

After reviewing the complaint, the school district thought that it might be a draft legal complaint but also recognized that it might have been meant in part as a request for a due process hearing under the IDEA.[15] As a precautionary matter, the district appointed a hearing officer to oversee the complaint, as required under applicable regulations governing requests for due process hearings. Bickford later informed the hearing officer that she did not intend to proceed with her due process hearing request, so no hearing was held.[16]

Meanwhile, the department had referred Bickford's complaint to the attorney general's office; after reviewing it, Assistant Attorney General Tom Dahl returned it to Bickford with a letter asking for clarification "because of several procedural problems that it presents." Dahl described three particulars that needed to be clarified.

Dahl began by observing that only Bickford had signed the complaint. He asserted that complaints must be signed by all complainants "or by their attorney." Since the state bar association had informed him that Bickford was not an attorney, Dahl pointed out that she was not entitled to bring an action on behalf of anyone other than herself.

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[15] In Alaska, IDEA due process hearings are governed by 20 U.S.C. § 1415(f); AS 14.30.193; and 4 AAC 52.550.

[16] In addition, the district evidently thought that Bickford might have meant to pursue an administrative complaint under the IDEA. In September 1998, based on a letter and other materials sent by Bickford in August 1998, the district had asked the Department of Education to undertake a general review of its testing procedures for compliance with state and federal law. It appears that the department undertook such a review

Next, Dahl noted that no court had been specified in the complaint, but that Bickford had requested injunctive relief under the federal rules of civil procedure. If the complaint was intended to initiate a federal civil proceeding, Dahl asked that Bickford name the federal court she had in mind and clarify what federal question she was presenting. If, on the other hand, Bickford intended the complaint to initiate proceedings "either under 34 C.F.R. § 300.506 [mediation procedure] or 4 AAC 52.500 [the state code provision governing IDEA administrative complaints[17]]," Dahl informed her that she would have to "restate the claim on behalf of [her] child and [herself] alone, and ask for the state to investigate the complaint as provided in the [latter] regulation."

Last, Dahl noted that if Bickford had intended her complaint to initiate a civil action, neither state nor federal courts would allow her to sue the school board without first exhausting administrative procedures. If, on the other hand, Bickford was attempting to request a due process hearing, Dahl claimed that the school district, not the department, was the "proper defendant" as, under federal law, the state board's role was limited to hearing appeals from local districts' final decisions.

Indicating that these deficiencies made it difficult to determine how Bickford wanted to proceed, Dahl informed her that the department would take no further actions "unless and until" Bickford clarified her intentions.

Bickford responded to Dahl's letter with a letter dated December 7, 1998, signed by Bickford and seven other parents, addressing each of Dahl's enumerated points.

Bickford acknowledged that she was not an attorney, and she wrote that it had not been her intent to act as one. She noted that a 1993 brochure, "Your Rights as the Parent of a Child Who Experiences a Disability," featured a section entitled "Complaint Procedure" that cite[d] federal regulations" and provided:

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[17] In Alaska, IDEA administrative complaints are governed by 34 C.F.R. §§ 300.660-.662 (1998) (current version at 34 C.F.R. §§ 300.151-.153 (2006)) and 4 AAC 52.500.

> The department will review, investigate and take appropriate action on:
> 300.662 . . . . written complaints alleging that a district or other educational agency is acting contrary to [state] or federal requirements for special education.

It was Bickford's understanding, she clarified, "that the complaint procedure was informal and parent friendly. . . [t]he form of the complaint and identification of who may submit a complaint" not being identified. She then accused the department of having improperly "dismiss[ed]" her complaint on the grounds that she had failed to satisfy a procedural requirement that neither she nor any of the other parent ever knew existed:

> [Y]our dismissal of our complaint without giving us the opportunity to satisfy your requirement that all persons party to the complaint submit an actual signature acknowledging their joining the complaint, sets out a standard of which we were not informed.

Second, Bickford clarified that no court had been identified in her complaint because "the State [IDEA Administrative-] Complaint Procedures, 34 CFR §§ 300.660-300.662, was the intended jurisdiction of our complaint." (She did not acknowledge, though, that this was the first time she had explicitly invoked 34 C.F.R. §§ 300.660-.662 (1998)).

Finally, Bickford claimed that the department was a proper defendant in her action because the department qualified as an "other educational agency" as the term was used in 34 C.F.R. §§ 300.660-.662 (1998), and because the state had a federal duty to monitor local compliance with the IDEA.

Bickford summed up by asserting that her action was a class action, that Dahl had failed to acknowledge that the state had "mandated complaint procedure[s]," and that she and the other parents believed that they had exhausted the administrative remedies available to them. Based on these assertions, Bickford indicated that she would not resubmit a clarified complaint to the department but instead planned "to file this complaint in District Court in Anchorage." Evidently, Bickford did file a suit against the department and school board in the United States District Court for the District of

Alaska; apparently the suit was dismissed and the United States Court of Appeals for the Ninth Circuit eventually affirmed the dismissal.[18]

C. Bickford's Second Complaint

On May 24, 1999, Bickford filed a second complaint entitled, "Complaint and Request for Due Process Hearing for Violations of the Individuals with Disabilities Education Act." The complaint included as plaintiffs (and was signed by) all eight of the plaintiffs from Bickford's original complaint; but the only defendant it named was the department's Office of Special Education Programs. In the complaint, Bickford alleged that the way the department had handled her original complaint had violated the IDEA. Though her allegations were largely limited to IDEA violations, she also requested that the department "issue finding that the Alaska Department of Education has not fulfilled its duty to provide procedural protections under Section 504." Bickford also mentioned the ADA in her second complaint but did not allege any ADA violations, and did not request that the department find that Assistant Attorney General Dahl's actions had violated the ADA.

The department construed the filing to be a complaint seeking both a due process hearing and administrative investigation; it thus responded by asking for several clarifications. It noted that administrative complaints are to be distinguished from complaints for due process hearings and that the nature of Bickford's complaint therefore needed to be clarified. It also asked Bickford to make clear whether she was bringing her new complaint on behalf of the named complainants, or whether the listed parents were asserting separate complaints of behalf of their own children. In addition, the department noted that Bickford's new complaint seemed to include allegations of ADA and section 504 violations, which the department had no authority to address. Finally, it sought to confirm its understanding of "the issue(s) to be the subject of

---

[18] *See Bickford v. Anchorage Sch. Dist.*, No. CV-98-00408-HRH (D. Alaska Feb. 3, 1999) (dismissing case without prejudice), *aff'd by* 208 F.2d 220 (9th Cir. 2000) (unpublished table decision), *cert. denied*, 531 U.S. 876 (2000).

the complaint investigation" stating that it believed the issues to be "[d]id the Department follow the complaint procedures as required by the IDEA?"

Bickford replied with a two-page letter in which she clarified that she was. Indeed, requesting both a "complaint investigation" and a "due process hearing" and had styled the new complaint as she had "so as to give the Department maximum flexibility in addressing [her] concerns." Bickford also "welcome[d]" the state's remarks regarding the ADA and section 504, since they had confirmed for her that those issues could only be resolved in a federal court. Finally, Bickford confirmed that she understood the department's position to be that her complaint only sought an investigation of one issue – "Did the Department follow the complaint procedures as required by the IDEA?" – but did not confirm that this comported with her own understanding of the complaint.

Bickford and the department then held a teleconference to further settle matters. During the teleconference, Bickford abandoned her request for a due process hearing, and agreed that the only issue to be investigated was whether the department had violated IDEA complaint procedures. The department thus treated Bickford's second complaint as being solely an administrative special education complaint filed under its regulations implementing the IDEA.[19] Accordingly, it appointed an investigator, Betty Barats, to perform the require investigation of Bickford's administrative complaint.

In performing her investigation, Barats discerned six specific allegations of wrongdoing in Bickford's administrative complaint:

> [1.] A due process hearing was not completed within 45 days of the written request.
>
> [2.] A written decision was not received by the complainant within 60 days.
>
> [3.] In spite of numerous calls to the State Department of Education, not one parent received correspondence about the complaint.

---

[19] *See* 4 AAC 52.500.

> [4.] The letter from the Assistant Attorney General did not address the merits of the complaint.
>
> [5.] The Assistant Attorney General did not respond to a letter signed by eight parents on December 7, 1998.
>
> [6.] The State Department of Education did not have appropriate written policies, practices and procedures for the filing and handling of complaints.

Barats issued twenty-two findings of fact addressing these points but found no evidence of a "violation of law," though she concluded that Dahl had made one "misleading" statement in his letter to Bickford. Barats also determine that it was "reasonable to interpret the intent [of Bickford's complaint] as either a request for a Due Process Hearing or notification of a legal action" and she closed her report with a recommendation that Bickford re-submit her complaint in a less confusing form:

> The complainant chose to use a format that is common in the legal arena resulting in confusion around the intent of the complaint. There are procedures in place for the handling of such complaints, and the facts uncovered in this investigation do not present evidence of violation of law.
>
> This investigator would encourage the complainant to re-submit the complaint to the appropriate department, being sure to follow the instructions provided in the *Notice of Procedural Safeguards: Parental Rights for Special Education* booklet.

Commissioner of Education Richard S. Cross adopted Barats's decision and dismissed Bickford's complaint.

D. Bickford's Appeal to the Superior Court

Bickford appealed the commissioner's decision to the superior court. On appeal, she initially moved for a remand, asserting that the commissioner had improperly issued a decision without affording her a right to a hearing. The superior court granted her motion and remanded the case to the department with directions "to receive testimonial and documentary evidence that [Bickford] seeks to include in the record." Although the department conducted a hearing on re-

mand, "no new evidence was disclosed with which to supplement the record [and] [n]o additional documents were admitted into evidence."

Bickford then moved for summary judgment in the superior court. Her motion sought to expand the scope of the appeal to include not just the procedural issues decided in response to her second complaint but also the procedural issues regarding the original complaint. Thus, in addition to challenging the department's refusal to accept her original complaint, Bickford asked the superior court to remand the case to the department and require it to address the merits of the issues raised in the original complaint. In support of her motion for summary judgment, Bickford submitted a "Corrected" and expanded version of the complaint she originally filed on October 9, 1998.

After considering the department's opposition, Superior Court Judge John Suddock affirmed the commissioner's decision to dismiss Bickford's case, determining that investigator Barats's findings and conclusions were "supported by substantial evidence" and "not contrary to law." The court declined to address Bickford's motion to grant summary judgment on new issues not considered and decided by Barats, explaining that "summary judgment is not permitted under the Appellate Rules" and that the documents offered in support of the new issues were "outside the scope of this court's order allowing supplementation of the record and supplemental briefing."

After considering a motion by Bickford asking the court to reconsider various aspects of its ruling, the superior court summarily denied the motion, and Bickford filed this appeal.

III. DISCUSSION

A. Standards of Review

Bickford argues that the superior court was wrong to dismiss her second complaint because the department mishandled her original complaint. In particular, she now argues that when the department returned her original complaint to her, it both violated IDEA, ADA, and section 504 complaint resolution-procedures, and denied her procedural due process.

She also argues that the superior court did not have jurisdiction to hear this dispute. In response, the department argues that no provision of federal law governed the processing of Bickford's ambiguous complaint and that the department's decision to ask Bickford to clarify her intent was entirely proper. It argues that the superior court had jurisdiction to hear Bickford's administrative appeal, and it asks us to affirm the superior court's decision dismissing Bickford's case because Commissioner Cross's decision to adopt investigator Barats's report was not an abuse of discretion.

When the superior court acts as an intermediate court of appeal in an administrative matter, we independently review the decision of the administrative agency.[20] For questions of fact, we apply a "substantial evidence" standard, asking whether an agency's findings are supported by 'such relevant evidence as a reasonable mind might accept to support a conclusion.'"[21] For issues of law not involving agency expertise, "such as statutory interpretation and constitutional issues," we utilize a "substitution of judgment" or "independent judgment" standard.[22]Under this standard, we are free to substitute our own judgment for the agency's – even if the agency's decision had a reasonable basis in law[23]– and will adopt rules of law most persuasive in light of reason, precedent, and policy.[24]

B. Bickford's IDEA Claims

1. Jurisdiction

As an initial matter, Bickford contends that the superior court lacked jurisdiction to hear her administrative appeal. First, she argues that the superior court's jurisdiction was defective because the Department of Education impermissibly removed her complaint from its "primary jurisdiction" by as-

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[20] *Collins v. Arctic Builders, Inc.*, 31 P.3d 1286, 1288-89 (Alaska 2001)

[21] *Phillip Weidner & Assocs., Inc. v. Hibdon*, 989 P.2d 727, 730 (Alaska 1999) (quoting *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997)).

[22] *State, Dep't of Pub. Safety v. Shakespeare*, 4 P.3d 322, 324 (Alaska 2000); *Phillip Weidner & Assocs.*, 989 P.2d at 730.

[23] *Shakespeare*, 4 P.3d at 324

[24] *Phillip Weidner & Assocs.*, 989 P.2d at 730

signing it to an assistant attorney, Dahl, who was "not under the supervision, direction, or control of the Commissioner of Education, but the Attorney General." Second, Bickford also argues that the superior court's jurisdiction was defective because she never exhausted her administrative remedies and because no complaint investigator ever issued a final decision on the merits of her complaint.

We disagree. First, there is no merit to Bickford's "primary jurisdiction" argument. At base, Bickford appears to be arguing that the Department of Education should not have been allowed to involve lawyers from the attorney general's office in the resolution of her complaint; that assertion is plainly incorrect. Second, Bickford's exhaustion argument is also unpersuasive. Bickford appealed a final agency determination to the superior court. Once the Department of Education had completed its investigation of Bickford's administrative complaint, no additional administrative procedures were available to her. The superior court was therefore properly positioned to hear her appeal.[25]

2. Challenges to rejection of Bickford's original complaint

The core of Bickford's appeal is that the department violated the IDEA by returning her original complaint to her without considering its merits. The department argues that Bickford's original complaint was too ambiguous to even trigger the IDEA and it contends that its ambiguity warranted the department's request for clarification.

As already stated, Bickford's administrative complaint was assigned to investigator Barats. As part of her investigation, Barats conducted interviews with Bickford, Assistant Attorney General Dahl, three members of the Department of Education, two special education officers employed by the Anchorage School District, an attorney, another parent named in the complaint, and a secretary of the State Board of Education. She also reviewed the documents and correspondence described in our facts and proceedings section, state court

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[25] *See* Alaska R. App. P. 602(a)(2).

rules, federal regulations, and the department's complaint-intake form.

Barats's decision considered six specific IDEA allegations Bickford raised in connection with the rejection of her original complaint and found that the record failed to support any of these claims. The Commissioner of the Department of Education upheld this determination. We must consider whether the law and the record support Barats's decision.

First, Barats addressed the contention that no due process hearing was completed within 45 days of Bickford's written request. Barats found that no violation had occurred both because (a) the Anchorage School District attempted to conduct a due process hearing but Bickford advised it that she no longer wanted the hearing; and (b) the department was not the proper party from which to request a due process hearing. Regarding the school district's efforts, the record confirms that the district did indeed attempt to conduct a due process hearing and that Bickford in fact did tell the district that she no longer wanted a hearing. As to the department's failure to conduct a due process hearing, Bickford fails to establish that it had a legal obligation to do so.

Federal law leaves states free to enact laws determining whether due process hearings "shall be conducted by the State educational agency or by the local educational agency."[26] Alaska state law squarely assigns the duty to local school districts by recognizing that there are only two parties to a due process hearing – school districts and parents – and by specifying that a hearing may be requested by serving the opposing party: in other words, parents requesting due process hearings must make the request to the district.[27]

The second allegation Barats considered involved Bickford's contention that her original complaint had incorporated a complaint for administrative investigation that the department failed to decide within sixty days of its filing, as the

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[26] 20 U.S.C. § 1415(f)(1)(A).

[27] AS 14.30.193(a) provides that "[a] school district or a parent of a child with a disability may request a due process hearing" and that "[a] request is made by providing written notice to the other party to the hearing." (Emphasis added.)

IDEA required.[28] Barats noted that federal regulations allow states to "delay resolution of identical issues raised in a complaint while those issues are pending in a due process hearing"[29] and concluded that it was proper for the department to take no action on Bickford's complaint, which seemed to be requesting both, pending clarification that Bickford was not pursuing a due process hearing or notification that her hearing had been completed. We find no error in this determination.

Barats next considered Bickford's contention that, "[I]n spite of numerous calls," Bickford was the only parent of the eight parents her original complaint listed as plaintiffs who received correspondence from the department about the complaint. Barats concluded that no violation of law occurred, both because (a) Bickford was the only party who signed the complaint and (b) the complaint had not been properly served on the department. We agree with the first rationale and need not consider the second.

In her original complaint Bickford failed to make clear whether she meant to file a formal civil court claim, a request for an IDEA due process hearing, an administrative complaint, or some combination of the three. Since no other plaintiff signed the original complaint and Bickford would have lacked authority to assert or represent the interests of other parents in either a court case or a formal due process hearing, it was not unreasonable for the state to communicate only with Bickford until she clarified her intentions and made suitable changes to her complaint. Bickford cites no provision of law that would have required the department to respond or send copies of responses to each of the named plaintiffs, and we are aware of no such provision. Accordingly the record discloses no error of law or fact on this point.

Fourth, Barats considered Bickford's complaint that Dahl's letter failed to address the merits of her original complaint. Barats found that although the original complaint might have been meant as an administrative complaint, it was

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[28] *See* 34 C.F.R. § 300.661 (1998) (current version at 34 C.F.R. § 300.152 (2006)); *see also* 4 AAC 52.500(c)(6).

[29] *See* 34 C.F.R. § 300.661 (1998) (current version at 34 C.F.R. § 300.152 (2006)); *see also* 57 Fed. Reg. 44,794, 44,851 (Sept. 29, 1992).

also "reasonable to interpret the intent [of Bickford's complaint] as either a request for a Due Process Hearing or notification of a legal action." Barats concluded that, given this ambiguity, Dahl could reasonably determine that "the appropriateness of the procedures being followed . . . were the only 'merits' that could be addressed in that early stage."

Barats did find, however, that Dahl's letter to Bickford was misleading to the extent that it directed her to amend her complaint to include only herself and her child if she intended it as a complaint for administrative investigation under 4 AAC 52.500. Barats found the instruction mistaken as a matter of law because unlike requests for due process hearings, administrative complaints under 4 AAC 52.500 need not be restricted to an individual child. Barats nevertheless concluded that, while misleading, this error "does not constitute a violation of the law." We need not decide the point: considering the remaining uncertainties in Bickford's original complaint and Bickford's December 7 letter notifying the department that the plaintiffs would be pursuing their case in federal court, we see no reasonable likelihood that Dahl's misstatement on this relatively minor point had any prejudicial effect. Accordingly, even assuming that a misstatement of the law might amount to a violation of the IDEA under some circumstances, any error here was plainly harmless.

As we have already determined above in upholding Barats's ruling on Bickford's second allegation, Dahl's decision to call for clarification instead of attempting to guess Bickford's intent was reasonable under the circumstances in all other respects.

The fifth point of error Barats considered was Bickford's assertion that Dahl violated the IDEA by failing to reply to the parents' December 7 letter, which responded to Dahl's letter to Bickford and answered his questions seeking clarification of the original complaint's intent. Barats found as an initial matter that "[t]here are no requirements in [the] IDEA regarding such a letter," so Dahl's failure to respond could not have amounted to a violation of the law.

More important, Barats ruled that "[s]ince that letter expressed the complainants['] intent to file in District Court and

did not request additional action by the State . . . there was no reason for a response at that time." The latter ruling is dispositive here: the December 7 letter unequivocally notified Dahl and the department that Bickford would be filing an action in federal court, would not be filing an amended complaint, and was not requesting the state to act on her original complaint as clarified in the December 7 letter. In short, the letter left no door open and no reason to respond.

The sixth allegation Barats considered was whether the department had established appropriate written policies, practices, and procedures to guide Bickford in attempting to file and pursue her original complaint. Investigator Barats found that the Department of Education had issued a "Notice of Procedural Safeguards" to parents that met "at least the minimum requirements of the law and also indicate[d] the department and address to which a complaint should be submitted." She found that Bickford had been given a copy of this document and had ample time to re-file her complaint in accordance with its instructions. Bickford has not challenged these findings on appeal, and we see no obvious error in them. Assistant Attorney General Dahl's effort to point out the original complaint's ambiguities and to obtain a clarified complaint appears to us to have been a reasonable attempt to provide precisely the guidance that Bickford claims she lacked; and her own abrupt refusal to submit an amended complaint leaves no basis for claiming prejudice from lack of earlier guidance.

C. ADA and Section 504

Bickford next claims that the state violated complaint-resolution procedures of the ADA and section 504 by returning her original complaint without addressing its merits. She further argues that the ADA and section 504 claims set out in her original complaint should be "rejoined to the IDEA claims and remanded to [the] superior court" for a ruling on the merits.

The department responds that Bickford's ADA and section 504 claims "are not part of this appeal." It also notes that Bickford's points on appeal to the superior court focused solely on IDEA claims. Moreover, the department notes that

even if we did consider Bickford's ADA and section 504 claims, we would have to reject them because only the Anchorage School District could consider them in the first instance.

We agree that these claims have not properly been preserved. Bickford failed to raise these claims in her second complaint. At the investigation stage before the department, Bickford expressly agreed that Barats would investigate only whether the department had complied with IDEA procedures. Neither the department nor the superior court had occasion to address them. And as the superior court correctly determined, Bickford could not properly resurrect her original complaint in her administrative appeal to the superior court seeking review only of the department's dismissal of her second complaint. Bickford's ADA and section 504 claims are not properly a part of this appeal.

D. Due Process

Finally, Bickford also argues that the state's response to her first complaint denied her procedural due process. She argues that she should have been allowed to "amend [her] request for disparate remedies," that the department never provided her with the opportunity to correct errors, that it provided her with an inadequate description of her procedural rights, and that the department's "informal" complaint procedures and formal "due process hearing" procedures are "confusing optional avenues." She suggests that each of these actions (or omissions) violates the three-part *Mathews v. Eldridge*[30] balancing test we have adopted to assess whether administrative actions violate due process.[31]

The department argues that Bickford "received the full process to which she was entitled." It argues that Bickford was entitled only to a guarantee that the Department of Education would take a "hard look" at her complaint, citing *Laidlaw Transit, Inc. v. Anchorage School District*.[32] Moreo-

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30 *Mathews v. Eldridge*, 424 U.S. 319 (1976).

31 *See, e.g., State, Dep't of Health & Soc. Servs. v. Valley Hosp. Ass'n*, 116 P.3d 580, 583 (Alaska 2005).

32 *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1025 (Alaska 2005).

ver, the department argues, the superior court actually provided Bickford with an unusual amount of process in this case by allowing her the opportunity to create a record by examining witnesses and introducing documents.

We decline to address these arguments because Bickford's due process claims are also inappropriately raised at this point. Bickford did not raise these arguments before the superior court and they are therefore beyond the scope of her appeal.

IV. CONCLUSION

For these reasons, we AFFIRM the superior court's and the department's decisions to dismiss Bickford's complaint.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Pamela Bickford,	)	
Appellant	)	
vs.	)	
State of Alaska, Department of	)	
Education and Early Development,	)	
And Shirley J. Holloway, in her	)	
Official capacity as Commissioner of	)	Case No.
Education and Early Development,	)	
Appellees.	)	3AN-99-3470 Civil

ORDER REGARDING APPELLANT'S MOTION TO ALTER OR AMEND JUDGMENT, OR ALTERNATIVELY FOR NEW TRIAL

Appellant's motion to alter or amend the judgment of October 4, 2004, and/or to set a new trial is Denied.

Dated November 11, 2004.

/s/ John Suddock
Superior Court Judge

I certify that on 11-12-04 a copy of the above was mailed to each of the following at their addresses of record: P.Bickford/Cross/Slotnick/Katcher.
/s/ dg Secretary/Deputy Clerk

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE

Pamela Bickford,	)	
Plaintiff	)	
vs.	)	
State of Alaska, Department of	)	Case No.
Education,	)	3AN-99-3470 Civil
Defendant.	)	

1. INTRODUCTION

This is an appeal from the August 20, 1999 administrative decision of Richard S. Cross, Commissioner of the State of Alaska Department of Education and Early Development, dismissing appellant's May 24, 1999 complaint. The Commissioner's final order adopted the Findings of Fact and Conclusions of Law set forth by Complaint Investigator Betty Barats as its own and dismissed the complaint. The sole issue of the complaint was whether the Department of Education followed proper procedures upon receipt of an earlier complaint, dated October 9, 1998.

II. FACTS AND PROCEEDINGS

Appellant, Pamela Bickford, filed her first complaint with the State of Alaska, Department of Education ("Department") on October 9, 1998, alleging, with a broad brush, that the Anchorage School District was failing to evaluation and identify special needs children, in violation of the Individuals with Disabilities Education Act (IDEA). The complaint did not cite specific conduct, but generally alleged a widespread systemic failure. The document was titled "Complaint and Request for Due Process Hearing," and named as defendants the Anchorage School Board and the district's Superintendent, as well as the State Board of Education and its Commissioner. The plaintiffs included a number of children and their parents, as well as "a class of similarly situated persons." Though purporting to be a class action, the complaint was signed only by Pamela Bickford, who is not an attorney. Ms. Bickford requested injunctive and declaratory relief, and served both

the Department and the School District. In the format of a legal brief, the document made numerous allegations of wrongdoing on the part of the School District with respect to the IDEA, § 504 of the Rehabilitation Act of 1973 ("§ 504"), and the Americans with Disabilities Act of 1990 ("ADA").

On October 27, 1998, Robyn Rehmann, Director of Special Education for the Anchorage School District, wrote Ms. Bickford the first of several letters, seeking to clarify the concerns raised in the complaint. Ms. Rehmann pointed out that because a due process hearing is held for individual students, not for a group, Ms. Bickford's request was unclear. Nonetheless, Ms. Rehmann provided the names of three hearing officers from which Ms. Bickford could choose. Enclosed with the letter was an explanation of the complaint procedures that addressed, among other things, the difference between an administrative complaint and a due process hearing.

In her response of November 2, 1998, Ms. Bickford declined to select a hearing officer, contending that pending jurisdictional issues needed to be resolved first. On November 9, Ms. Rehmann urged the appellant to move quickly, as the district was under a 45 day deadline.

On November 18, 1998, Ms. Rehmann wrote a letter purporting to memorialize a conversation with Ms. Bickford on November 12. The letter stated that if Ms. Bickford wished to withdraw her request for a hearing officer, that request must be in writing. Until then, Ms. Rehmann would appoint hearing officer LuAnn Weyrauch.

Ms. Bickford responded the following day, denying the content of the conversation. While Ms. Bickford did not recall discussing any withdrawal, she recalled discussing a lack of response from the Department, and agreeing that it would be improper to appoint a hearing officer before then. Ms. Rehmann wrote back on November 24, suggesting that Ms. Bickford deal directly with Ms. Weyrauch.

On November 26, 1998, hearing officer Weyrauch wrote to Ms. Bickford and Ms. Rehmann, withdrawing from the case. Ms. Weyrauch indicated that she had spoken to Ms. Bickford, who said she did not intend to pursue her hearing request with the district. Ms Weyrauch wrote that Ms.

Bickford stated she had mailed a letter of withdrawal to the district. Ms. Rehmann denied receipt of any letter.

Meanwhile, the Department forwarded the October 9 complaint to Assistant Attorney General Thomas Dahl. AAG Dahl returned the document to Ms. Bickford on November 17, 1998, along with a letter explaining procedural problems created by the complaint. Mr. Dahl explained that Ms. Bickford could not bring this action on behalf of other parents without the assistance of an attorney. The letter also pointed out that declaratory and injunctive relief are unavailable at the administrative level.

Mr. Dahl further explained that Ms. Bickford had both lodged a complaint and requested a due process hearing, thus triggering disparate remedies. Due process hearings are conducted by local school boards, pursuant to 34 C.F.R. § 300.507. A complaint is investigated by the Department, pursuant to 34 C.F.R. §§ 660-662 and 4 AAC 52.500.

Mr. Dahl concluded that the Department was unsure how to respond in the face of the document's irregularities. He suggested that Ms. Bickford refile her complaint, with the appropriate agency, once she had attended to the identified procedural problems. He closed by stating that the Department would "do nothing further in this matter unless and until you have clarified your intentions." Dahl letter to Bickford, November 17, 1998.

Ms. Bickford responded to this letter on December 7, 1998. She rebutted each point individually, arguing that the original document was correctly drafted and perfectly clear. She criticized the Department's "dismissal of our complaint." And state that "we have exhausted what administrative remedies were available to us." She concluded, "This letter is intended to inform [you] of our intention to file this complaint in District Court in Anchorage." Bickford letter to Dahl, December 7, 1998. The letter did not contain a request for additional action on the part of the State. Ms. Bickford subsequently filed a complaint in federal court. That complaint was dismissed due to procedural defects on February 3, 1999.

On May 24, 1999, Ms. Bickford filed a second document naming the Department only, titled "Complaint and Request

for Due Process Hearing for Violations of the Individuals with Disabilities Education Act". The document again listed multiple complainants. The complaint did not address the substantive issues raised in the earlier document, but concerned only the Department's response to the October 1998 complaint. In particular, Ms. Bickford protested Mr. Dahl's inaction regarding her earlier complaint, and his failure to address its merits. It is this complaint alone which is the subject of this administrative appeal.

On June 3, 1999, Dr. Wendy Tada, a Program Manager with the Department's Office of Special Education Programs, wrote to Ms. Bickford to clarify the issues raised in the May 24, 1999 complaint. Similar in tone to Mr. Dahl's letter of November 17, 1998, this letter explained the difference between a due process hearing and a complaint investigation, and directed any request for a due process hearing back to Robyn Rehmann with the School District. Dr. Tada also attempted to clarify whether Ms. Bickford was speaking on behalf of the other parents listed as complainants. Finally, Dr. Tada framed the issue for the complaint investigation as, "Did the Department follow the complaint procedures as required by the IDEA?" Dr Tada letter to Bickford, June 3, 1999. Dr. Tada invited Ms. Bickford to clarify and confirm these points, and scheduled a telephone conference with Ms. Bickford, Dr. Tada, Dr. PJ Ford Slack of the Department of Education, and the as yet unnamed complaint investigator.

Ms. Bickford responded to this letter on June 10, 1999, addressing each of Dr. Tada's points in turn. Ms. Bickford agreed that the issue was whether the Department followed the complaint procedures in response to the October 9, 1998 complaint, and suggested that if the Department would acknowledge this error in writing, the complainants would be satisfied. She also expressed a willingness to pursue mediation. The letter was signed by all of the complaining parents, indicating that Pamela Bickford was authorized to speak on their behalf.

On June 16, 1999, Dr. Tada, Ms. Bickford, and three others participated in a teleconference addressing the issues raised in the complaint. In two subsequent letters, Dr. Tada

indicated that the parties had agreed an administrative complaint was the appropriate process to address the current issue, rather than a due process hearing. Dr. Tada assigned Betty Barats to be the complaint investigator for the case.

In the course of Ms. Barats' investigation, she contacted Ms. Bickford and another complainant, Robyn Rehmann, Tom Dahl, Wendy Tada, P.J. Ford Slack, and other representatives from the Anchorage School District and the Department of Education. She completed her investigation and issued her report on August 5, 1999.

Ms. Barats investigated whether the Department of Education followed the complaint procedures as required by the IDEA. In addition, she responded to six specific allegations of wrongdoing:

> Item #14: A due process hearing was not completed within 45 days of the written request.
>
> Item #15: A written decision was not received by the complainant within 60 days.
>
> Item #16: In spite of numerous call to the State Department of Education, not one parent received correspondence about the complaint.
>
> Item #18: The letter from the Assistant Attorney General did not address the merits of the complaint.
>
> Item # 20: The Assistant Attorney General did not respond to a letter signed by eight parents on December 7, 1998.
>
> Item # 24: The State Department of Education did not have appropriate written policies, practices and procedures for the filing and handling of complaints.

Her Finding of Fact summarized the events outlined above, and her Conclusions of Law addressed each of the six allegations of wrongdoing in turn. The Complaint Investigator found no evidence that the Department violated the law. Rather, Ms Barats concluded that the formal legal format of the initial document created confusion about the complainants' intent, and precluded further action on the part of the Department. She encouraged the complainants to re-submit their complaint to the appropriate department in the form of a simple letter outlining their concerns, following the instruc-

tions provided in the *Notice of Procedural Safeguards: Parental Rights for Special Education* booklet.

The Department issued its final administrative decision on August 20. 1999. Commissioner Richard S. Cross adopted the Findings of Fact and Conclusions of Law set forth by the Complaint Investigator, and dismissed Ms. Bickford's complaint. This appeal followed. Thereafter, Ms. Bickford filed a series of procedural motions which delayed resolution of her appeal but gained her no substantial relief.

III. STANDARD OF REVIEW

There are four standards of review for administrative appeals. For questions of fact, the Alaska Supreme Court employs the "substantial evidence" test. Under that test, the Court asks, "whether those findings are supported by such relevant evidence as a reasonable mind might accept to support a conclusion." *Collins v. Arctic Builders, Inc.*, 31 P.3d 1286, 1289 (Alaska 2001). For questions of law utilizing agency expertise, the Court uses the "reasonable basis" test. In such situations, the Court "merely seek[s] to determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if [it] may not agree with the agency's ultimate determination." *Tesoro v, Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987). *See also, CH Kelly Trust v. Municipality of Anchorage, Bd. Of Equalization*, 909 P.2d 13811, 1382 (Alaska 1996).

For questions of law where no agency expertise is necessary, the Court employs the "substitution of judgment test." "Application of this standard permits a reviewing court to substitute its own judgment for that of the agency even if the agency's decision had a reasonable basis in law." *Id.* Finally, for administrative regulations, the "reasonable and not arbitrary" test is used. *Estate of Basargin v. State, Commercial Fisheries Entry Comm.*, 31 P.3d 796, 799 (Alaska 2001). This means that a court will defer to the agency's interpretation unless it is "plainly erroneous and inconsistent with the regulation." *Board of Trade, Inc. v. State, Dep't of Labor, Wage & Hour Admin.*, 968 P 2d 86, 89 (Alaska 1998).

IV. DISCUSSION

1. Summary of Required Procedures

Under federal law, an aggrieved parent may initiate a complaint or a due process hearing for violations of the IDEA. A due process hearing is appropriate for issues relating to the identification, evaluation, or educational placement of a child with a disability. The hearing "must be conducted by the SEA [State Educational Agency] or the public agency directly responsible for the education of the child, as determined under State statute..." 34 C.F.R. § 300.507.

Complaints are either filed with the SEA, or, at the SEA's discretion, with a public agency, in which case the SEA may review the agency's decision. 34 C.F.R. § 300.600. The SEA has 60 days after a complaint is filed to complete any on-site investigation it determines is necessary; give the complainant an opportunity to submit additional information; review all relevant information to determine if the public agency is in violation of the law; and issue a written decision that addresses each allegation of the complaint, contains findings of fact and conclusions, and provides the reasons for the SEA's final decision. 34 C.F.R. § 300.661.

34 C.F.R. § 300.661(c)(1) provides in pertinent part:

> If a written complaint is received that is also the subject of a due process hearing under § 300.507 ... or contains multiple issues, of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing.

Alaska has adopted regulations to comply with the federal requirements outlined above. 4 AAC 52.550 provides that a parent may initiate a hearing by filing a written request with the school district. The hearing may challenge the "identification, evaluation, or educational placement" of a child. 4 AAC 52.500 sets out the procedures for handling complaints alleging hat a district or other public agency is violating the IDEA. These written complaints may be submitted to the Department.

2. Complaint Investigator Barats' Report

Complaint Investigator Betty Barats identified six specific allegations of wrongdoing in Ms. Bickford's complaint, and addressed each individually.

a. A due process hearing was not completed within 45 days of the written request.

Investigator Barats found that the initial complaint was titled, "COMPLAINT and REQUEST FOR DUE PROCESS HEARING." According to the Alaska Administrative Code, the District is the appropriate agency with which to file a request for a hearing. 4 AAC 52.550(a). While the Department is ultimately responsible for the District's actions, it is not directly responsible for meeting the time lines for a due process hearing. Therefore, Ms. Barats concluded that the State did not violate the law in this respect. Barats Report, p. 6. This finding is supported by substantial evidence.

Ms. Barats also found that the School District responded appropriately to the request for a due process hearing. Robyn Reymann responded within 18 days of the initial request, and attempted to facilitate the choice of a hearing officer. When Ms. Bickford did not choose a hearing officer, Ms. Reymann did so. On November 26, 1998, the hearing officer advised Ms. Reymann that Ms. Bickford had withdrawn her request for a due process hearing. Ms. Barats concluded that neither the School District nor the Department had violated the law. Barats Report, p. 6. This finding is supported by substantial evidence.

b. A written decision was not received by the complainant within 60 days.

Under the federal regulations, the State may delay investigation of issues raised by a complaint, that are simultaneously the subject of a due process hearing, in order to avoid inconsistent decisions and wasted resources. 34 C.F.R. § 300 Appendix C. Under the state regulatory scheme, the Anchorage School Board is the body responsible for due process hearings. Because Ms. Bickford requested both a due process hearing and a complaint investigation, the State properly deferred action until the resolution of the due process hearing. Ms. Barats found that the November 17, 1998 letter from

AAG Dahl to Ms. Bickford, seeking clarification of the complainant's intent, was all that was required of the State, and that no laws were violated. Barats Report, p. 6. This finding is supported by substantial evidence. Thereafter, Ms. Bickford elected to pursue the matter in federal court, rather than with the Department.

c. In spite of numerous calls to the State Department of Education, not one parent received correspondence about the complaint.

Contrary to Ms. Bickford's assertions, Ms. Barats found ample evidence of communication between the State and complainant Bickford, who purported to represent all of the parents. In addition to the letter from Mr. Dahl, Ms. Bickford received three letters from Ms. Reymann, and the two spoke on the phone. Ms. Barats found there was no violation of the law. Barats Report, p. 6. This finding is supported by substantial evidence.

d. The letter from the Assistant Attorney General did not address the merits of the complaint.

Thomas Dahl's November 17, 1998 letter to Ms. Bickford attempted to clarify the procedural issues raised by the October 9 document. AAG Dahl explained each of Ms. Bickford's options, and provided instructions for each procedural path. Investigator Barats hound that these procedural points were the only "merits" that Mr. Dahl could address at that point. Barats Report, p. 7. This finding is supported by substantial evidence and is not contrary to law. Thereafter, Ms. Bickford did not pursue the matter further with the Department.

e. The Assistant Attorney General did not respond to a letter signed by eight parents on December 7, 1998.

Ms. Barats found that no such response was necessary. The December 7 letter was not required by IDEA, and did not correspond to any procedural step. Further, the letter requested no additional action by the State. Barats Report, p. 7. The finding that no response was required was not an error.

f. Allegation that the State Department of Education did not have appropriate written policies, practices and procedures for the filing and handling of complaints.

Alaska has adopted regulations to comply with 34 C.F.R. § 300.660(a). 4 AAC 52.500 states in pertinent part that the "department will review, investigate, give the complainant the opportunity to submit additional information, take appropriate action, and issue to the complainant within 60 days a written decision." In addition, the Department publishes a document that explains the difference between written complaints, mediation, and due process hearings, and provides instructions for initiating each process. Inspector Barats found that these instructions meet or exceed the minimum requirements of the law. In addition, Ms. Barats notes that Ms. Bickford received a copy of the document in October, shortly after she filed her initial complaint, when she had time to re-file properly. Barats Report, p. 7. This finding is supported by substantial evidence and is not contrary to law.

V. CONCLUSION

The final decision of the Commissioner, adopting the Findings of Fact and Conclusions of Law of the Complaint Investigator, was supported by substantial evidence and was not contrary to law. The order dismissing the May 24, 1999 complaint is affirmed.

Dated this 4th day October, 2004 at Anchorage, Alaska.

/s/John Suddock
Superior Court Judge

I certify that on 10-4-04 a copy of this order was mailed to counsel at their address of record: Pamela Bickford, Richard Cross, AG-Ken Truitt, Jonathan Katcher. /s/ D Gallipeo, Administrative Assistant

STATE OF ALASKA
Department of Education and Early Development
Office of the Commissioner
Goldbelt Place
801 West 10th Street, Suite 200
Juneau, Alaska 99801-1894
(907) 465-2800
(907) 465-4156 fax

August 20, 1999

Pamela L. Bickford
16840 Tide View Drive
Anchorage, AK 99516

Dear Ms. Bickford:

We have reviewed the Complaint Investigation Report prepared for the Department of Education and Early Development by Ms. Betty Barats, Complaint Investigator.

The Department adopts the Findings of Fact and Conclusions of Law set forth by the Hearing Officer as its own. Accordingly, Complaint No. 99-11 is dismissed.

This is a final administrative decision. You have the right to appeal this decision to the Superior Court according to Rule 602(b), Alaska Rules of Appellate Procedure. Be advised that if you intend to appeal this decision, Rule 602(b) requires you to file your notice of appeal with the Superior Court within 30 days of the date of this letter was mailed to you, or your appeal will not be considered.

Sincerely,
/s/ Richard S. Cross
Commissioner

COMPLAINT INVESTIGATION REPORT
Alaska Department of Education[1]

Complaint Number: 99-11
Complaint Filed by:
Pamela Bickford on behalf of Parents for Literate Graduates
Educational Agency:

Alaska State Department of Education in relation to the handling of a complaint against Anchorage School District and the State Department of Education

Complaint Received:

Received by the department on 5/27/99, issues clarified by teleconference 6/16/99. Date to complete report extended to 8/16/99 (granted on 7/16/99 due to unavailability of school district employees)

Complaint Investigator: Betty Barats, Contractor

COMPLAINT ISSUES:

Issue: Whether the Department of Education followed the complaint procedures as required by IDEA.

The complaint included the following allegations of wrongdoing:

Item #14: A due process hearing was not completed within 45 days of the written request.

Item #15: A written decision was not received by the complainant within 60 days.

Item #16: In spite of numerous calls to the State Department of Education, not one parent received correspondence about the complaint.

Item #18: The letter from the Assistant Attorney General did not address the merits of the complaint.

Item #20: The Assistant Attorney General did not respond to a letter signed by eight parents on December 7, 1998.

Item #24: The State Department of Education did not have appropriate written policies, practices and for the filing and handling of complaints.

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[1] As of July 1, 1999, the department's name changed to the Department of Education and Early Development (EED).

CONTACTS:

Name	Relationship to the student	Date(s)
Wendy Tada	Program Manager, AK DOE	6/16/99
		7/6/99
		7/26/99
PJ Ford Slack	Interim Director of Special Education, AK DOE	6/16/99
		7/28/99
Pamela Bickford	Complainant	6/16/99
		6/17/99
		7/5/99
		7/21/99
Linda Otterson	Special Education Secretary, Anchorage School District	6/30/99
DiAnn Brown	Former Director of Special Education, AK DOE	7/3/99
Christine Boggs	Complainant	7/5/99
Art Cernosia	Attorney, Legal Consultant with LRP Publications	7/5/99
Tom Dahl	Asst. Attorney General, State of AK	7/7/99
		7/15/99
Dottie Knuth	Secretary, AK State Board of Educ.	7/15/99
Robyn Rehmann	Special Education Director, Anchorage School District	7/20/99
		7/21/99
		7/22/99

DOCUMENTS RECEIVED BY INVESTIGATOR FROM:
AK State Department of Education

- Complaint Intake Form
- Letter dated 11/17/98 from Asst. Attorney General Tom Dahl to complainant
- Document dated 5/24/99 entitled "Complaint and Request for Due Process Hearing for Violations of the Individuals with Disabilities Education Act" that included the following attachments:

  Exhibit A entitled "Complaint and Request for Due Process Hearing"

  Exhibit B, a letter dated 12/7/98 to Tom Dahl from complainants

Exhibit C entitled "Notice of Procedural Safeguards: Parental Rights for Special Education" from the Alaska Department of Education
Exhibit D, pages 12464 and 12464 of the Federal Register Rules and Regulations

- Letter dated 6/1/99 from Penny Beiler, Human Resource Manager, AK DOE, to complainant
- Letter dated 6/3/99 from Wendy Tada to complainant Document entitled "Response to Letter of 6/10/99" written by Wendy Tada

Complainant

- Document dated 5/16/99 entitled "Complaint for Violations of §504 of the Rehabilitation Act and the Americans with Disabilities Act"

Office of the Attorney General, State of Alaska

- Alaska Rules of Court, Rule 602
- Letter dated 10/27/98 from Robyn Rehmann to the complainant

Anchorage School District

- Letter dated 11/2/98 from complainant to Robyn Rehmann
- Letter dated 11/9/98 from Robyn Rehmann to the complainant
- Letter dated 11/18/98 from Robyn Rehmann to the complainant
- Letter dated 11/19/98 from complainant to Robyn Rehmann
- Letter dated 11/24/98 from Robyn Rehmann to the complainant
- Letter dated 11/26/98 from the hearing officer to complainant and Robyn Rehmann

FINDINGS OF FACT:

1. On October 9, 1998 the document "Complaint and Request for Due Process Hearing" was submitted to the Anchorage School District Board of Education, the Alaska State Board of Education, the Superintendent of the Anchorage School District, and the Commissioner of Educa-

tion for the State of Alaska. The first page included a list of "plaintiffs" by first name and last initial – 12 students and 12 "parents and next friends" – and the above recipients as "defendants." The document was signed by only one complainant.

2. The document of 10/9/98, in the format of a legal document, made numerous allegations of wrongdoing on the part of the school district with regard to IDEA, §504 and ADA; and cited jurisdiction, allegations of class, statutory entitlements and prayer for relief.
3. On October 27, 1998, Robyn Rehmann, Director of Special Education for the Anchorage School District, wrote a letter to the complainant acknowledging receipt of the initial complaint and request for due process hearing. In that letter the following was included:

   a)-"We are unable to determine what issue or concern you are raising about your daughter for which a due process hearing is appropriate."

   b)-"...you may not submit a request for a due process hearing for a group or on behalf of a group: a due process hearing under the IDEA is intended to consider and review the unique educational needs of individual students, not a group."
4. In the same letter of 10/27/98, Ms. Rehmann submitted the names of three hearing officers and requested written notification, within 5 days, of the complainants selection. Otherwise Ms. Rehmann would make the selection herself.
5. Enclosed with the letter of 10/27/98 to the complainant was "a copy of the Notice of Procedural Safeguards issued by the Alaska Department of Education." On page 6 of this document is the beginning of the section entitled OPPORUNITY TO PRESENT COMPLAINTS. Included are instructions o how and with whom to file a) an administrative complaint ("Written Complaint"), b) a request for Mediation, and c) a request for a Due Process Hearing. The document differentiates among the three in terms of their purpose, the types of issues they address, and who is responsible for the handling of each.

6. On November 2, 1998, the complainant submitted a letter to Robyn Rehmann that contained the following statement: "I believe your appointment of a hearing officer would be improper at this time as there are jurisdictional issues that need to be resolved."
7. On November 9, 1998 Robyn Rehmann submitted a letter to the complainant again requesting that she approve the appointment of one of the hearing officers since the district is held to a timeline of 45 days to completion. She also stated that the jurisdictional issues "or any other you may have, can be brought forward to an appointed hearing officer for resolution."
8. On November 17, 1998, Assistant Attorney General Tom Dahl returned the document of 10/9/98 to the complainant requesting clarification of the intent with information regarding possible courses of action including: complaint under state regulations, complaint in the U.S. District Court or other Court; and complaint for a due process hearing.
9. In the above letter, Mr. Dahl made the following statements:

   a) "If this is a complaint under state regulations, specifically 4 AAC 52.500, please restate the claim on behalf of your child and yourself alone, and ask for the state to investigate the complaint as provided in the regulation."

   b) "But if this is a complaint for a due process hearing under 34 C.F.R. § 300.505, the proper defendant is the district that is responsible for delivering special education or related services."

   c) "...if the complaint is brought under state regulations, the proper defendant is the district under 4 AAC 52.550 and the Department of Education, Office of Special Services is the agency to which any party may bring an appeal."
10. In the final sentence of the above letter dated 11/17/98, Mr. Dahl states, "We will do nothing further in this matter unless and until you have clarified your intentions."
11. On November 18, 1998, Robyn Rehmann submitted a letter to the complainant referring to a conversation be-

tween the two on 11/12/98. The letter included the following statements:

a) "At that time I understood you to say that you may be withdrawing your request and pursuing your concerns in another manner. I did state that if this was the case then I need a letter stating that you are withdrawing your request."

b) "At this time, I am appointing hearing officer, LuAnn Weyrauch to this case."

12. On November 19, 1998, the complainant submitted a letter to Robyn Rehmann in response to her letter dated 11/18/98. In it, the following statements were made:

a) "I do not recall ever discussing withdrawing my request and you never requested a letter stating that I was withdrawing my request."

b) "As I recall, we discussed the fact that we had not heard from the Department of Education and until we did it would be improper to appoint a hearing officer...."

13. In the letter dated 11/19/98, the complainant also stated "...it is my understanding that the state should have procedures established to bring a complaint/hearing request under Section 504 and my understanding that a class action is permitted under the Rehabilitation Act of 1973."

14. On November 24, 1998, Robyn Rehmann submitted a letter to the complainant in which she stated "Rather than engage in discourse with you about what we discussed or what we understood one another to have said, it is best to leave that to our contacts with LuAnn Weyhrauch."

15. The letter of 11/24/98 also states, "...I have contacted Ms. Weyhrauch to advise her she has been appointed as the hearing officer in this matter, whether it is a due process hearing under the IDEA or a hearing under 504 of the Rehabilitation Act.

16. On November 26, 1998, LuAnn Weyhraugh submitted a letter to Robyn Rehmann and the complainant stating in writing her withdrawal as hearing officer. "When I then spoke with [complainant] about scheduling ... a [scheduling] teleconference, [complainant] told me that she did

not intend to proceed with her hearing request with the Anchorage School District."

17. In the above letter of 11/26/98, Ms. Weyhrauch also stated that the complainant told her that she had mailed a letter to the district on the preceding Friday stating her intent to withdraw the request.
18. According to Robyn Rehmann, the district did not receive such a letter.
19. On December 7, 1998, the complainant submitted a letter to Mr. Dahl, rebutting "several procedural problems" identified in his letter dated 11/17/99 [98]; the letter included the following statement:

    "This letter is intended to inform the Alaska State Board of Education, Commissioner Holloway, the Anchorage School Board, and Superintendent Christal, of our intention to file this complaint in District Court in Anchorage ...."

    The letter did not contain a request for additional action on the part of the State.
20. On May 24, 1999 eight complainants signed a document entitled "Complaint and Request for Due Process Hearing for Violations of the Individuals with Disabilities Education Act." The cover page lists the complainants v. Office of Special Education Programs, Alaska Department of Education; Part I INTRODUCTION quotes sections of federal law, regulations and definitions; Part II NON-COMPLIANCE UNDER THE IDEA again quotes federal law and includes the following items of concern regarding the IDEA:

    Item #14 "Unless the parties agree to an extension of time a Due Process Hearing should have been completed within 45 days of the request."

    Item #15 "Unless there are extenuating circumstances and the parties agree to an extension of time a complainant should receive a written decision within 60 days."

    Item #16 Despite numerous calls to the Department of Education in Juneau regarding the complaint, not one parent received correspondence about the complaint."

Item #18 "The letter [from Tom Dahl] of November 17 did not address the merits of the complaint."

Item #20 "Mr. Dahl did not respond to the parents' letter [of December 7]."

Item #24 "If the State Department of Education had in place appropriate written policies, practices and procedures Complainants would have received appropriate review of their claims of non-compliance with IDEA Part B and it is likely that the dispute would have been amicably resolved many months ago."

Additional concerns were expressed about Section 504 and ADA requirements.

21. According to complainant, it was their intent to request both a due process hearing and file an administrative complaint. Since they did not know how to proceed, they tried to cover all bases.
22. According to Tom Dahl, from what was submitted to the Department, he was under the impression the complainant was filing a complaint in federal court.

CONCLUSIONS OF LAW:

Issue 1: Whether the Department of Education followed the complaint procedures as required by the IDEA.

Although only one issue has been identified in this complaint, there are six items listed in the letter of complaint that define the nature of the concern (Finding of Fact #20). Therefore, this report will address each of these items as they related to the issue at hand.

Item # 14: A due process hearing was not completed within 45 days of the written request

The initial complaint submitted was entitled "COMPLAINT and REQUEST FOR DUE PROCESS HEARING" (Finding of Fact #1). 20 USC 1415 § 615(f)(1) states, "Whenever a complaint has been received...the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency as determined by state law or by the State educational agency." According to Alaska Administrative Code 4 AAC 52.550(a), the district is

the appropriate agency with which to file a request for a hearing. The State, although ultimately responsible for what happens at the district level, is not the agency directly responsible for meeting the time lines for a due process hearing. Therefore, the State is not in violation of the law in this respect.

In addition, within 18 days of the initial request, the Special Education Director of Anchorage School District responded with a letter requesting clarification (Finding of Fact #3). In that letter she attempted to clarify for the complainant what could and could not be handled in a Due Process Hearing (Finding of Fact #3). In the same letter, she began the due process hearing action by offering the names of three potential hearing officers from which the complainant could choose (Finding of Fact #4). There was a great deal of misunderstanding and confusion in the following month (Finding of Fact #11, #12, #13, and #14). Since the complainant did not select a hearing officer, the process was delayed and the District Special Education Director made the selection (Finding of Fact #6, #7, #11, #15). In a letter dated November 26th, the district was advised by the hearing officer that the complainant had withdrawn her request for a due process hearing (Finding of Fact #16). There is no evidence that the law was violated by either the District or the State.

Item #15: A written decision was not received by the complainant within 60 days.

For clarification, this timeline refers to the administrative complaint (CFR § 300.661).

Appendix C to Part 300 states that "in order to avoid the possibility of inconsistent decisions on the same subject matter and waste of government resources, a State may delay resolution of identical issues raised in a complaint while those same issues are pending in a due process hearing." Therefore, if the complainant was requesting both an administrative complaint investigation and a due process hearing (Finding of Fact #21), the hearing would take precedence, and the State would wait for the hearing officer's decision. It is not the State Depart-

ment that initiates the due process hearing, but rather the local school district (4AAC 52.550). Anchorage School District followed that procedure (Finding of Fact #4). Beyond the letter dated 11/17/99 from the Assistant Attorney General, there was nothing more for the State to do until they received clarification of the intent, or the due process hearing was completed. Therefore there is no evidence of violation of law in this regard on the part of the State.

Item # 16: In spite of numerous calls to the State Department of Education, not one parent received correspondence about the complaint.

The initial complaint, although listing a number of complainants, was signed by only one complainant (Finding of Fact#1). The Assistant District Attorney submitted a letter to that complainant that requested clarification and addressed a number of options available to the complainant (Finding of Fact #8, #9, #10). As stated above, the district (not the state) is the appropriate agency with which to file a request for a hearing. Therefore, in addition to the letter from the Assistant District Attorney, the complainant received three letters from the Anchorage School District Special Education Director between October 27th and November 24th (Finding of Fact #3, #7, #11, #14). There was also phone contact between the two (Finding of Fact #11). Therefore, there is no basis for violation of law in this regard.

Item #18: The letter from the Assistant Attorney General did not address the merits of the complaint.

The complainant did not fully understand the process for filing complaints or the different types of complaints, so she submitted her document to the District, the State Board of Education, and the State Commissioner of Education (Finding of Fact #1 and #21). Because the title of the request and the legal format in which it was submitted (Finding of Fact #2), it is reasonable to interpret the intent of the document as either a request for a Due Process Hearing or notification of a legal action (Finding of Fact #22). Since the law refers to a Due Process Hearing as a "complaint" (20 USC 1415 § 615(f)(1),

there was nothing to indicate the complaint was intended as a request for an administrative complaint investigation. In his letter to the complainant in response to that document, the Assistant Attorney General requested clarification of the intent with a description of alternative actions and the proper channels to follow for each. Included in that was the procedure for a Due Process Hearing (Finding of Fact #9). Although he did not address the issues found therein, he did address the appropriateness of the procedures bring followed which were the only "merits" that could be addressed in that early stage.

However, the statement by the Assistant Attorney General identified in Finding of Fact #9(a) is misleading in that a complaint under 4 AAC 52.500 need not be restricted to an individual child. The administrative complaint process described in this section of the Alaska Administrative Code can be accessed by any organization or individual when there is a question of actions contrary to the requirements of AAC Chapter 52 or IDEA. There is no restrictions regarding the number of students named in a complaint. Nevertheless, this does not constitute a violation of the law.

Item #20: The Assistant Attorney General did not respond to a letter signed by eight parents on December 7, 1998.
There are no requirements in IDEA regarding such a letter. Since that letter expressed the complainants intent to file in District Court and did not request additional action by the State (Finding of Fact #19), here was no reason for a response at that time.

Item #24: Allegations that the State Department of Education did not have appropriate written policies, practices and procedures for the filing and handling of complaints.

4 AAC 52.500 states that "the department will review, investigate, give the complainant the opportunity to submit additional information, take appropriate action, an issue to the complainant within 60 days a written decision that addresses

each allegation, concerning complaints alleging that a district has violated a requirement of Part B of the Act.

In September of 1998, the Alaska Department of Education issued a revision of the *Notice of Procedural Safeguards: Parental Rights for Special Education.* On page 6 of that document begins a section entitled "Opportunity to Present Complaints" with sub-headings including "Written Complaint," "Mediation" and "Due Process Hearing" with instructions for submitting each. The instructions meet at least the minimum requirements of the law and also indicate the department and address to which a complaint should be submitted. The complainant was given a copy of this document in October which would have given ample time to re-file the complaints as specified in that document (Finding of Fact #5). Therefore the State is not in violation of CFR § 300.660(a).

ADDITIONAL COMMENTS/RECOMMENDATIONS[2]

As stated by the complainant in her letter dated 12/7/99, complaint procedures are intended to be "parent friendly." A letter to the office of Special Education Programs sating the concern and giving specific reasons for the concern will put the process in motion. The complainant chose to use a format that is common in the legal arena resulting in confusion around the intent of the complaint. There are procedures in place for the handling of such complaints, and the facts uncovered in this investigation do not present evidence of violation of law.

This investigator would encourage the complainant to resubmit the complaint to the appropriate department, being sure to follow the instructions provided in the *Notice of Procedural Safeguards: Parental Rights for Special Education* booklet.

INVESTIGATION COMPLETED: AUGUST 5, 1999

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[2] This report references 1992 federal IDEA regulations because he 1997 regulations were not in effect at the time the events that are the focus of this complaint occurred. The 1997 federal regulations went into effect on May 11, 1999 and compliance was not required until July 19, 1999 (when the state received federal funds for fiscal year 1999 funding)

STATE OF ALASKA
Department of Education and Early Development
Office of the Commissioner
Goldbelt Place
801 West 10th Street, Suite 200
Juneau, Alaska 99801-1894
(907) 465-2800
(907) 465-4156 fax

June 1, 1999

Pamela L. Bickford, Coordinator
Parents for Literate Graduates
16840 Tide View Drive
Anchorage, AK 99516

Dear Ms. Bickford:

I am in receipt of your complaint dated May 16, 1999 alleging violations by the Anchorage School District of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), and Individuals with Disabilities Education Act (IDEA).

I am the Human Resource Manager for the Department of Education and the designated coordinator for Section 504 and ADA. I apologize for department staff not referring you to the appropriate individual. My responsibilities relating to Section 504 and ADA extend to employees of the Department of Education.

The Department of Education has no responsibility for oversight of Section 504 and ADA compliance at the local school district level. Your complaint should be directed to the Office of Civil Rights at the following address:

U.S. Department of Education
Office of Civil Rights
Henry M. Jackson Federal Building
915 Second Avenue, Room 3310
Seattle, Washington 98174-1099

I have forwarded your complaint to P.J. Ford-Slack, Special Education Director for the Department of Education to review the issues you raise regarding IDEA.

Sincerely,
/s/ Penny Beiler
Human Resource Manager

cc: Bruce Johnson, Director
Teaching & Learning Support
Tom Dahl
Assistant Attorney General
Harry Gamble
Information Officer

UNITED STATES DEPARTMENT OF EDUCATION
Office of Special Education and Rehabilitative Services

March 22, 1994

Contact Person
Name: Thomas B. Irvin
Telephone: (202) 205-8825

OSEP 94-16

To: Chief State School Officers
From: Thomas Hehir /s/TH
Director, Office of Special Education Programs
Subject: Complaint Management Procedures under Part B of the Individuals with Disabilities Education Act (Part B)

A. Introduction

The purpose of this memorandum is to call your attention to the requirements for State complaint procedures that are set out in §§300.660-300.662 of the final Part B regulations, as published on September 29, 1992. We wanted to highlight these procedures, because they contain a number of additional requirements that State education agencies (SEAs) must implement - - which were not required in past years, when the complaint procedures were included in the Education Department General Administrative Regulations (EDGAR).[1]

The memorandum also includes information about (1) the relationship between the complaint resolution and due process hearing procedures in the Part B regulations, (2) the SEA's

[1] The State complaint procedures were previously included at 34 CFR 76.780-782. When certain amendments were made to EDGAR on July 8, 1992 (57 FR 30328), that regulatory action removed the complaint procedures from EDGAR and added identical requirements to the Part B regulations at §§300.670-300.672. However, when the final Part B regulations were published on September 29, 1992 (57 FR 44794), the State complaint procedures were renumbered as §§300.660-300.662, and changes were made in the procedures, based on comments received on the August 19, 1991 Notice of Proposed Rulemaking (NPRM).

general supervisory responsibilities with respect to those procedures, (3) the process that the Office of Special Education Programs (OSEP) will follow in responding to a written complaint that is submitted directly to OSEP from a complainant within a State, or is referred by the Office for Civil Rights (OCR) or a member of Congress, and (4) OSEP's revised procedures for monitoring each SEA's implementation of the State complaint requirements.

B. State Complaint Procedures

The following is a description of the requirements for State Complaint Procedures, as set out in §§300.662-300.662 (The new requirements are capitalized and BOLDED):

1. Adoption of State Complaint Procedures: Filing a Complaint. (§§300.660-300.662)

Section 300.660 requires each SEA to adopt written procedures for:

a. Resolving any complaint that meets the requirements of §300.662[2] by - -

(1) Providing for the filing of a complaint with the SEA; and

(2) AT THE SEA'S DISCRETION, PROVIDING FOR FILING THE COMPLAINT WITH A PUBLIC AGENCY, AND THE RIGHT TO HAVE THE SEA REVIEW THE PUBLIC AGENCY'S DECISION OF THE COMPLAINT.

b. INFORMING PARENTS AND OTHER INTERESTED INDIVIDUALS ABOUT THE COMPLAINT PROCEDURES IN §§300.660-300.662.

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[2] Section 300.662 provides that an organization or individual may file a signed written complaint that includes (1) a statement that a public agency has violated a requirement of Part B, and (2) the facts on which the statement is based.

Although an SEA is not required to resolve complaints that do not meet the requirements of §300.662 (e.g., telephone complaints or other oral complaints), SEAs may elect to have procedures for transcribing oral complaints into written form if they choose to do so.

2. Minimum State Complaint Procedures (§300.661)

Section 300.661 requires the SEA to include the following in its complaint procedures:

a. A time limit of 60 calendar days after a complaint is filed under §300.660(a) to - -

(1) Carry out an independent on-site investigation if the SEA determines that such an investigation is necessary;

(2) GIVE THE COMPLAINANT THE OPPORTUNITY TO SUBMIT ADDITIONAL INFORMATION, EITHER ORALLY OR IN WRITING, ABOUT THE ALLEGATIONS IN THE COMPLAINT;

(3) REVIEW ALL RELEVANT INFORMATION AND MAKE AN INDEPENDENT DECISION AS TO WHETHER THE PUBLIC AGENCY IS VIOLATING A REQUIREMENT OF PART B; AND

(4) ISSUE A WRITTEN DECISION THAT ADDRESSES EACH ALLEGATION IN THE COMPLAINT AND CONTAINS – (I) FINDINGS OF FACT AND CONCLUSIONS, AND (II) THE REASONS FOR THE SEA'S FINAL DECISION.

b. An extension of the time limit under §300.661(a) only if exceptional circumstances exist with respect to a particular complaint.

c. PROCEDURES FOR EFFECTIVE IMPLEMENTATION OF THE SEA'S FINAL DECISION, IF NEEDED, INCLUDEING TECHNICAL ASSISTANCE ACTIVITIES, NEGOTIATIONS, AND CORRECTIVE ACTIONS TO ACHIEVE COMPLIANCE.

d. The right of the complainant OR THE PUBLIC AGENCY to request the Secretary to review the SEA's final decision.

C. Relationship Between the Complaint Management and Due Process Hearing Systems

Under the Part B regulations, parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the educa-

tion of their children - - i.e., (1) the complaint management system required in §§300.660-300.662 (which is the subject of this memorandum), and the impartial due process hearing system required in §§200.506-300.513.

The State complaint procedures are available for resolving any complaint that meets the requirements of §300.662, including (1) complaints that raise systemic issues, and (2) individual child complaints that are filed by parents. Thus, parents may use these procedures – in lieu of the due process hearing system – to resolve disagreements with public agencies over any matter concerning the identification, evaluation, or educational placement of their child, or the provision of a free appropriate public education (FAPE) to the child.

It is impermissible under Part B for an SEA (1) to have a procedure that removes complaints about FAPE or any other matter concerning the identification, evaluation, or educational placement of a particular child from the jurisdiction of its complaint management system, or (2) to advise or require parents to request a due process hearing before the SEA can initiate a complaint investigation. Thus, whenever an SEA receives a complaint that a public agency is violating a requirement under Part B, including any matter for which parents could request a due process hearing, the SEA must resolve the complaint within 60 calendar days, using the procedures outlined in B, above.

In some cases, a written complaint may be received that is also the subject of a due process hearing, or may contain multiple issues, of which one-or-more may be part of that hearing. In those cases, the Stte must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60 calendar day timeline using the SEA's complaint management procedures.

D. SEA Implementation of Complaint Management Requirements – As a General Supervisory Responsibility

As part of its general supervisory responsibilities under section 612 of the Act (§300.600 of the regulations), each SEA must implement complaint resolution procedures in a manner that is fully consistent with the requirements of §§300.660-300.662. Thus, among other things, the SEA must ensure - -

1. That its procedures for informing parents and other interested parties, (including public agencies) about the complaint procedures are effective; and
2. That all actions required in §300.661(a) for reviewing and resolving a complaint - including issuing a written decision that addresses each allegation in the complaint - are completed within the required time limit of 60 calendar days.

The State complaint procedures, which are under the direct control of the SEA, have the potential for providing a less costly and more efficient mechanism for resolving disputes than is possible under the impartial due process hearing system. For these reasons, effective implementation of the complaint management procedures will have a positive impact on both parents and public agencies.

E. OSEP's Process for Responding to Direct Complaints

Because complaint resolution falls within the purview of the SEA's general supervisory responsibility; whenever OSEP receives a direct complaint from a complainant or as a referral from OCR or the Congress, we will continue to refer the complaint to the SEA for resolution – using the State's complaint management procedures required in §§300.660-300.662. In addition, and beginning immediately, OSEP will initiate the following procedures and timelines:

1. Upon receipt of a written complaint, OSEP will (a) inform the complainant that we have referred the complaint to the SEA, and (b) transmit the complaint to the SEA.

2. As appropriate, the DAS State contact will call the complaint specialist in the SEA to discuss the complaint, and provide additional background or information, if any exists, or otherwise clarify any requirements for resolving the complaint.

3. If a complaint raises the possibility tht there may be a violation of Section 504 of the Rehabilitation Act of 1973, we will also refer the complaint to OCR to conduct its own investigation. However, the SEA still must implement its own complaint resolution procedures in accordance with the requirements of §§300.660-300.662.

4. OSEP will request a copy of the final decision that the SEA provides to the complainant within 60 days of the SEA's receipt of the complaint. If exceptional circumstances exist that result in the granting of an extension of the 60 day timeline (see §300.661(b)), the SEA must (a) inform the complainant, in writing, about the extension (including its purpose and length), and (b) submit a copy of that explanation to OSEP.

5. Upon receipt of the SEA's report of findings and resolution, OSEP will review the report to ensure that it (a) responds to each of the issues raised by the complainant, and meets all timeline and procedural requirements.

6. Following OSEP's review of the SEA's final report, the DAS State contact will notify the SEA's complaint specialist about the status of the complaint (e.g., that (a) OSEP considers the complaint to be closed, or (b) if there appear to be problems with the SEA's resolution of the complaint, any additional steps that the SEA must follow to resolve the complaint).

F. OSEP's Revised Process for Monitoring Each SEA's Implementation of the Complaint Requirements

In the past, OSEP's monitoring of each SEA's implementation of the complaint requirements was conducted mainly through the monitoring staff's periodic on-site visit to the State. However, because of the important role that effective complaint management plays – both for parents and for the

SEA in meeting its general supervisory responsibilities – we have determined (1) that OSEP's monitoring of an SEA's complaint management must be an on-going process, and (2) that, for the most part, this area can be effectively monitored on an off-site basis.

Thus, OSEP will be making the following changes in its procedures for monitoring each State's compliance with the complaint management requirements:

1. SEA's Complaint Procedures. We will ask each SEA to submit its current complaint management procedures for review by OSEP's monitoring staff, to ensure that the procedures are complete and include all of the requirements of §§300.360-30.662.[3]

2. Complaint Logs and Other Information. We will be requesting each SEA to submit, on at least an annual basis, the SEA's Complaint Log, including the following information on each complaint: (1) timeline data (e.g., date received, and date written decision issued), (2) subject of complaint, (3) results, (4) number of complaints appealed to the Secretary, and (5) other information, as appropriate. We also will ask for similar information on the due process hearings conducted in each State.

3. Parent Centers and State P&A Agencies. OSEP monitoring staff will take steps to establish a link with staff in the Parent Training and Information Center and the Protection and Advocacy agency within each State – to determine their perceptions about the effectiveness of, and any problems with, the State's complaint resolution and due process hearing systems.

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[3] Any State that was (will be) monitored during the current (1993-94) cycle will not have to provide its complaint procedures, because a copy of those procedures were(will be) reviewed as part of OSEP's on-site review.

OSEP's analysis of the data and information from the above sources – including a review of the SEA's ability to respond effectively to OSEP-referred complaints – will enable our staff to determine (1) the compliance status of each State's complaint management system, and (2) if there is a pattern of concern raised through the complaint resolution process. In the event that potential problems are identified, we will validate our information and conclusions. Then, as appropriate, we will work with the SEA to assist in correcting those problems, and, if necessary, take other steps to ensure that required corrective actions are implemented.

If you have comments or questions about this memorandum, of if we can be helpful to you and your staff in meeting the complaint management and other Part B requirements, please feel free to call or write you State contact in OSEP's Division of Assistance to States.

cc: State Director of Special Education